

No. 15704

United States
Court of Appeals
for the Ninth Circuit

CANADIAN INDEMNITY COMPANY,
Appellant,
vs.
LEO TACKE, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Montana, Great Falls Division

FILED

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PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Plaintiff—Appellee:

WILLIAM L. BAILLIE,
First National Bank Building,

EMMETT C. ANGLAND,
Ford Building,
Great Falls, Montana.

For Defendant—Appellant:

HOFFMAN AND CURE,
First National Bank Building,
Great Falls, Montana.

In The United States District Court, for the
District of Montana, Great Falls Division

Civil No. 1648

LEO TACKE,

Plaintiff,

vs.

THE CANADIAN INDEMNITY COMPANY,
Defendant.

COMPLAINT

Comes Now, the plaintiff above named and for his cause of action, against the defendant herein, complains and alleges:

I.

This Court has jurisdiction hereof by reason of the fact that plaintiff is now and at all times mentioned herein was a citizen and resident of the State of Montana, in the City of Great Falls, Montana, and the defendant is a stock Insurance Company, with its home office at Winnepeg, Canada, and its United States head office at Los Angeles, California, and it is now and was at all times herein mentioned authorized to do and doing business in the State of Montana, with its principal office in said state, in the City of Helena, Montana, and the amount involved in this action, exclusive of interest and costs exceeds the sum of \$5,000.00.

II.

On September 20, 1952, and at all times mentioned herein, defendant designated Bill Kelly

Realty of Great Falls, Montana, as an authorized representative with power to execute a contract of insurance.

III.

That prior to September 17, 1952, plaintiff discussed with Bill Kelly of the Bill Kelly Realty in Great Falls, Montana, the fact that plaintiff had acquired a 1948 Chevrolet four door sedan which plaintiff was repairing and expected soon to have in running order, and plaintiff advised the said Bill Kelly that he would purchase an automobile liability policy from the Bill Kelly Realty when said automobile was in running order, and on the 17th day of September, 1952, through his wife, Lenora Tacke, ordered from the said Bill Kelly Realty an automobile liability policy of insurance for said 1948 Chevrolet automobile. On September 20, 1952, the defendant acting through its said agent, Bill Kelly Realty, issued to plaintiff an automobile policy of insurance under and by which policy of insurance defendant insured plaintiff from 12:01 A.M. on September 20, 1952 to September 20, 1953; that a copy of the policy of insurance issued to plaintiff is attached hereto, marked Exhibit "A" and by this reference made a part hereof.

IV.

Said policy of insurance was made, issued and delivered by defendant to plaintiff on the condition that plaintiff pay the total premium of \$39.00, which said sum plaintiff did pay to the defendant on September 22, 1952.

V.

On September 20, 1952, and after the effective date of said policy of insurance, plaintiff while driving and operating the 1948 Chevrolet four door sedan automobile described in said policy of insurance was involved in a collision near the City of Great Falls, Montana, with a motor vehicle being operated by Ed Kissee. As a result of said collision the plaintiff and his son Richard Tacke who was riding with him as a passenger were injured and Ed Kissee and Pearl Kissee who were riding in the motor vehicle being operated by Ed Kissee were injured and the motor vehicle being operated by Ed Kissee was severely damaged.

VI.

On the 10th day of December, 1952, defendant through its General Agent, H. S. Dotson Company, in accordance with the terms of the automobile insurance policy delivered to plaintiff, issued its certain Notice of Cancellation effective as of 12:01 A.M. the 21st day of December, 1952, a copy of which Notice of Cancellation is attached hereto, marked Exhibit "B" and made a part hereof; and in accordance with the provisions of Paragraph numbered 22 of "Conditions" set forth in said policy, the defendant adjusted the premium paid by plaintiff on a pro rata basis and refund was made to plaintiff, the defendant retaining the pro rata charge for the period 12:01 A.M. September 20, 1952 to the effective date of cancellation, 12:01 A.M. December 21, 1952.

VII.

On the 22nd day of May, 1954, Pearl Kissee filed in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, a complaint against the plaintiff for damage alleged to have been suffered by the said Pearl Kissee in that certain automobile accident in which plaintiff was involved on the 20th day of September, 1952; plaintiff forwarded to defendant in accordance with the terms of the automobile insurance policy issued to plaintiff by defendant, the complaint and summons which were served on plaintiff on the 24th day of May, 1954; copy of said Complaint and Summons are attached hereto, marked Exhibit "C" and by this reference made a part hereof; and thereafter and on the 11th day of June, 1954, defendant through one of its attorneys, H. B. Hoffman, advised plaintiff that the defendant herein declined and refused to defend plaintiff in the case filed by Pearl Kissee in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, and the said H. B. Hoffman, Esquire, then tendered to plaintiff the premium which plaintiff had paid to defendant for the period of time that said automobile insurance policy was effective, to-wit: 12:01 A.M. September 20, 1952 to 12:01 A.M. December 21, 1952, and defendant by tendering the earned premium on June 11, 1954, and after an action had been filed against plaintiff seeks to void its contractual obligation; plaintiff refused the tender on the 12th day of June, 1954, and returned to H. B.

Hoffman, Esquire, check tendered by him for and on behalf of defendant.

VIII.

By said policy of insurance, Exhibit "A" hereto, it is provided under insuring agreement II:

"Defense, Settlement, Supplementary Payments. As respects the insurance afforded by the other terms of this policy under coverages A and B the company shall:

(a) Defend any Suit against the Insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;

(b) Pay All Premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, the cost of bail bonds, required of the Insured in the event of accident or traffic law violation during the policy period, not to exceed the usual charges of surety companies nor \$100 per bail bond, but without any obligation to apply for or furnish any such bonds;

(c) Pay All Expenses incurred by the Company, all costs taxed against the Insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;

(d) Pay Expenses Incurred by the Insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;

(e) Reimburse the Insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy."

IX.

By reason of the defendant having refused and declined to represent plaintiff in the action filed by Pearl Kissee and by reason of the matters and things hereinbefore alleged the plaintiff herein will be subject to great peril and hazard if the plaintiff is required to defend the suit now pending as aforesaid against the plaintiff, and plaintiff is in great peril and damage of loss unless the policy of insurance herein referred to is properly construed and the rights of the parties determined in this action.

X.

In addition to the foregoing provision said policy of insurance prevents plaintiff from negotiating to settle the action pending against him in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade hereinbefore referred to; said policy of insurance provides that should plaintiff negotiate and settle said action for a reasonable amount he would be

prevented from then filing an action against the defendant for the amount of the settlement. Paragraph numbered 6 of "Conditions" set out in the policy provides in part as follows:

"Action Against Company.—Coverages A and B. No action shall lie against the company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by the written agreement of the Insured, the claimant and the company;"

XI.

By reason of defendant's denial of liability under said policy of insurance Glenn M. Schultz, Supervisor, Safety Responsibility Division, Montana Highway Patrol, Helena, Montana, forwarded to plaintiff a Notice of Security Requirement or Order of Suspension dated April 28, 1953, copy of which is attached hereto as Exhibit "D." To protect his right to his driver's license, it was necessary for plaintiff's attorneys to protest the issuance of the Notice of Security Requirement or Order of Suspension. This protest was unsuccessful and the Montana Highway Patrol by letter dated June 1, 1953, copy of which is attached hereto as Exhibit "E," among other things, advised plaintiff's attorneys that the defendant had advised the Montana Highway Patrol that plaintiff was not covered by insurance at the time of the accident that

occurred on September 20, 1952. Plaintiff appealed the said Order of Suspension dated April 28, 1953 and the letter decision of June 1, 1953 to the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade. By order duly given, made and entered on June 11, 1953 the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade stayed until further Order the Order of Suspension dated April 28, 1953 directed against plaintiff. By Order dated June 29, 1953, a hearing on plaintiff's appeal was set for July 30, 1953 and the Clerk of said Court was ordered to so notify appellant, the Supervisor of the Montana Highway Patrol and H. S. Dotson, General Agent for defendant. Notices of the date of hearing were issued by said Clerk of Court on June 29, 1953.

On July 30, 1953 the appeal came on for hearing and after being fully advised in the premises the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade duly gave, made and entered its order and decision by which the Court set aside the Order of Suspension issued by Glenn M. Schultz, Supervisor of the Montana Highway Patrol under date of April 28, 1953, and by which order the Court determined that the said Order of Suspension issued by the Supervisor of the Montana Highway Patrol was not issued in accordance with either the facts or the law applicable thereto and determined that on September 20, 1952, the plaintiff

herein had in effect an automobile liability insurance policy valid on its face and referred specifically to the policy of insurance which the defendant issued to the plaintiff and upon which this action is based. Copy of said Order dated July 30, 1953, duly given, made and entered by Hon. J. W. Speer, one of the Judges of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade is attached hereto marked Exhibit "F." The Canadian Indemnity Company was fully informed at all times of this proceeding by service of proper documents on the General Agent of the Company.

XII.

Because of defendant's failure and refusal to assume its responsibility under the contract of insurance with plaintiff it was necessary for plaintiff to employ attorneys to investigate the accident and to furnish professional services in connection with the accident, and to appeal the Order of Suspension of the Montana Highway Patrol and to furnish professional services to determine the validity of the insurance policy as well as bring this action all through the fault of defendant. That the reasonable value of said attorneys' services is Three Thousand Dollars (\$3,000.00).

Wherefore, Plaintiff prays judgment as follows:

1. That this Court determine, declare and adjudicate the validity of the policy of insurance herein set forth and the liability of the defendant

thereunder, and that as plaintiff contends herein, be found to be proper that this Court declare that said policy was and is a valid contract of insurance as of 12:01 A.M. September 20, 1952, and that the defendant is liable and obligated in accordance with the terms of said policy of insurance issued to plaintiff.

2. That this Court award to plaintiff reasonable attorneys' fees in the sum of Three Thousand Dollars (\$3,000.00) and for plaintiff's costs and disbursements herein incurred.

3. For such other and further relief as to the Court may seem meet and just.

/s/ WILLIAM L. BAILLIE,
/s/ EMMETT C. ANGLAND,
Attorneys for Plaintiff.

EXHIBIT "A"

COMBINED AUTOMOBILE POLICY

The Canadian Fire Insurance Company
The Canadian Indemnity Company
United States Head Office, Los Angeles, Calif.

Home Office: Winnipeg, Canada.

DECLARATIONS

1. Name of Insured: Leo Tacke.

Address: 124—20th St. S.W., Great Falls, Montana.

Policy Number: 22 CA 3908.

Agent: Bill Kelly Realty.

Address: Great Falls, Montana.

2. Policy period: From September 20, 1952 to September 20, 1953. (12:01 A.M. Standard time at the address of the named insured as stated herein.)

The automobile will be principally garaged in the above Town, County and State, unless otherwise specified herein:

The occupation of the named insured is: Body Man for International Harvesters.

Employer's name:

3. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by a specific premium charge or charges set opposite thereto. The limit of the Company's liability against each such coverage shall be as stated herein, subject to all of the terms of the policy having reference thereto.

Coverages

Coverage A. Bodily Injury Liability—Limits of Liability: \$10,000.00 Each person, \$20,000 Each accident. Premiums: \$24.00.

Coverage B. Property Damage Liability—Limits of Liability: \$5,000.00 Each accident. Premiums: \$11.00.

Coverage C. Medical Payments—Limits of Liability: \$500.00 Each person. Premiums: \$4.00.

Other coverage per endorsement attached hereto:

* * * * *

Premium: \$39.00.

Total Premium: \$39.00

4. Description of the Automobile and the facts respecting its purchase by Named Insured:

Year Model: 1948. Trade Name: Chevrolet.
 Type of Body (Load Capacity if truck: Seating
 Capacity if Bus): 4 dr. sedan.

* * * * *

5. If mortgaged, or encumbered, loss if any, under Coverages D, E, F, G, H and I payable as interest may appear, to the Named Insured and: no exception.

6. The purposes for which the automobile is to be used are: Pleasure and business.

Use of the automobile for the purposes stated includes the loading and unloading thereof.

7. No automobile insurance has been canceled by any company during the past year except as herein stated: no exception.

8. The Named Insured is the sole owner of the automobile except as herein stated: no exception.

Countersigned September 20, 1952.

BILL KELLY REALTY,

/s/ By J. C. HALVERSON,

(Authorized Representative.)

These Declarations, Together With Company Policy Form 102, Complete The Above Numbered Policy.

* * * * *

EXHIBIT "B"

The Canadian Fire Insurance Company

The Canadian Indemnity Company

Los Angeles Branch Office: 208 West 8th St.,
 Zone 14. Phone MADison 1126.

San Francisco Branch Office: 21 Sutter St., Zone
 4. Phone DOuglas 6866.

NOTICE OF CANCELLATION

Mr. Leo Tacke.

P. O. Address 124—20th St. S.W. December 10th,
1952, Great Falls Montana.

Dear Sir:

Under the terms of Automobile Policy No. 22CA
3908 the Companies give you notice of their desire
to cancel and do hereby cancel the said policy, in-
cluding any and all endorsements or certificates
attached thereto, cancellation to become effective
as of 12:01 A.M. of the 21st day of December, 1952,
standard time.

Please return cancelled policy as soon as possible.

Countersigned by

H. S. DOTSON CO.,

General Agent,

/s/ By A. W. BACON,

Agent.

EXHIBIT "C"

In The District Court of the Eighth Judicial
District of the State of Montana, In and
For The County of Cascade

PEARL KISSEE,

Plaintiff,

vs.

LEO TACKE,

Defendant.

SUMMONS

The State of Montana Sends Greetings to the
Above Named Defendants, and to Each of
Them:

I

That Defendant herein was at all times herein mentioned the owner and operator of a motor vehicle known as a 1948 Chevrolet sedan, hereinafter referred to as "Chevrolet";

II.

That on or about the 20th day of September, 1952, at approximately the hour of 8:30 A.M., Plaintiff was a passenger riding in the front seat of a 1946 GMAC pickup truck which was being driven and operated in a westerly direction on a County road known as the Old Sun River Bridge Road in Cascade County, Montana, by her husband, Ed Kissee;

III.

That at the same time and place, Defendant was proceeding in said Chevrolet in a southerly direction on a County Road known as the Gore Field Road approaching the intersection of the said Old Sun River Bridge Road and Gore Field Road, all in Cascade County, Montana;

IV.

That a stop sign had been duly and regularly installed at the northwest corner of the intersection of the aforementioned County roads; that said stop sign faced towards the southbound traffic on said Gore Field Road and directed and required all vehicles travelling said Gore Field Road in a southerly direction to come to a complete stop before entering the aforementioned intersection;

V.

That the Defendant so unlawfully, negligently and carelessly drove and operated said Chevrolet as to bring said Chevrolet into violent contact and collision with said GMAC pickup truck causing the injuries to the Plaintiff hereinafter set forth;

VI.

That at the time of said collision and immediately prior thereto, the Defendant was negligent and careless in the following particulars:

1. In failing to obey the stop sign signal and without regard for the right of the driver of the said GMAC pickup truck to drive the same into the intersection, proceeding to drive said Chevrolet into said intersection without stopping and colliding into said GMAC pickup truck, thereby causing the collision as aforesaid;

2. In failing to keep a proper look out for other vehicles on the aforementioned roads and particularly the vehicle in which Plaintiff was riding;

3. In failing to keep his automobile in proper control;

4. In operating his said Chevrolet without due caution or circumspection and in utter disregard of the rights of others and particularly of the rights of Plaintiff;

5. In driving his said Chevrolet in such a manner as to cause it to collide with the right side of the vehicle in which plaintiff was riding;

That each and all of said accident negligence

was and were a direct and proximate cause of the collision and the injuries to the Plaintiff;

VII.

That as a direct and proximate result of the use and operation of the said Chevrolet aforesaid, and of said collision, the Plaintiff sustained the following injuries to her person:

Bruises on the left forehead, chest, right wrist, and severe and painful shock to the entire nervous system.

all of which injuries have caused Plaintiff great pain, soreness and general shock and because of said injuries and their effects, the Plaintiff has been unable to perform properly her usual duties as a housewife, has suffered great mental anguish and has been hurt in her health, strength and activities, all to the damage of the Plaintiff in the sum of \$5,000.00;

VIII.

That in the reasonable treatment of the hereinabove described injuries, it was necessary for the Plaintiff to secure the services of skilled physicians, nurses and housekeeper and to be hospitalized; that at the date hereof, Plaintiff has incurred obligations as follows for the services rendered by the aforesaid persons and for such hospitalization: physician, \$55.00; Hospitalization, \$86.45; and housekeeper, \$64.00;

That the sums set out above are the reasonable cost and value of services rendered by the persons

who performed and rendered the same and of said hospitalization;

Wherefore, Plaintiff prays judgment against the Defendant in the sum of \$205.45 for special damages and in the sum of \$5,000.00 general damages and for her costs of suit herein incurred and for such other and further relief as to the Court may seem proper.

Dated this 20th day of May, 1954, at Great Falls, Montana.

JAMES & SCOTT,
By TED JAMES,
Attorneys for Plaintiff.

Duly Verified.

EXHIBIT "D"

Montana Highway Patrol
Safety Responsibility Division
Helena, Montana
April 28, 1953

NOTICE OF SECURITY REQUIREMENT
OR ORDER OF SUSPENSION

Case Number 6264.

Date of Accident Sept. 20, 1952.

Location of Accident West Great Falls, Montana.

Operator's License No.....

Suspension Order becomes effective June 15, 1953 (if Security Requirements are not met).

Leo Tacke
124 20th St., S.W.
Great Falls, Montana

Report of your above described accident indicates that you did not have liability insurance for bodily injury and property damage in effect at the time of the accident. The Laws of 1951, Chapter 204, and known as the Safety Responsibility Law provides that the Supervisor must enforce suspension of your driving and registration licenses unless he has received satisfactory evidence that you have:

1. Been released from liability; or
2. Been adjudicated not to be liable; or
3. Executed a duly acknowledged written agreement providing for the payment of all claims, not exceeding \$11,000.00 resulting from the accident; or
4. Deposited with the State Treasurer security, in the form of a surety bond from a duly authorized company, or a property bond or cash, in an amount sufficient to pay such claims, as determined by the Supervisor, up to \$11,000.00.

Unless you satisfy the security requirements listed above you must submit to this Division \$946.19 (946.19) (Amount of Security Required in Your Case), to be deposited with the State Treasurer, Helena, Montana, on or before the date the following Order of Suspension becomes effective. Personal Checks Are Not Accepted by the State Treasurer.

ORDER OF SUSPENSION

It is Hereby Ordered that your driving privilege and all operators licenses evidencing such privilege is suspended as of the date This Order Is Effective (as shown above) and all such licenses must be surrendered to the Safety Responsibility Division, Montana Highway Patrol, Helena, Montana.

This suspension will remain in effect until one (1) year has elapsed, following the date of such suspension, providing no court action has been instituted for damages, or until evidence satisfactory to the Safety Responsibility Division has been filed with it indicating that the requirements of the Safety Responsibility Law have been met.

This action is taken under the authority of Chapter 204, Laws of 1951.

Dated Signed April 28, 1953.

We have been advised by the Canadian Indemnity Company that you were not covered by liability insurance at the time of this accident.

GLENN M. SCHULTZ,
Supervisor.

The above Order for the deposit of Security is based on procedure as specified by the Safety Responsibility Law, and does not in any way fix the blame of any of the parties involved in the accident.

Form SR-8

EXHIBIT "E"

State of Montana
Montana Highway Patrol
Helena, Montana
June 1, 1953

Case No. 6264
Leo Tacke

Mr. Emmett C. Angland
Attorney at Law
521 Ford Building
Great Falls, Montana

Dear Sir:

The Canadian Indemnity Company has advised this office that Mr. Tacke was not covered by insurance at the time of the accident that occurred September 20, 1952.

Their investigation disclosed that the policy was not taken out until after the accident.

It will be necessary for Mr. Tacke to meet one of the other provisions of the Montana Motor Vehicle Safety Responsibility Law.

Yours very truly,

/s/ GLENN M. SCHULTZ,
Glenn M. Schultz,
Supervisor,
Montana Highway Patrol.

gms/a

EXHIBIT "F"

[Title of District Court and Cause No. 39270.]

ORDER

This matter came on regularly for hearing before the Court on the 30th day of July, 1953, in accordance with the Order of the Court fixing said date for the hearing of the appeal herein. The appellant appeared in person and by his counsel William L. Baillie and Emmett C. Angland, and Glenn M. Schultz, Supervisor of the Montana Highway Patrol, appeared in person, and there was no appearance by the Canadian Indemnity Company, a party in interest served with Notice of Appeal herein and with the Order fixing the day of hearing herein.

The Court examined the Notice of Appeal, the matters certified to the Court by the Supervisor of the Montana Highway Patrol and examined Policy No. 22 CA 3908 issued by the Canadian Indemnity Company, which policy appears valid on its face and became effective at 12:01 A.M. September 20, 1952, and the Court being fully advised in the premises, and for good cause finds that the Order of Suspension issued by the Supervisor of the Montana Highway Patrol, under date of April 28, 1953, was not issued in accordance with either the facts or the law applicable thereto, and further finds that the appellant at the time of the accident referred to in the Order of Suspension, to wit: September 20, 1952, had in effect an automobile liability policy valid on its face;

Now, Therefore, It Is Hereby Ordered that the

Order of Suspension issued by Glenn M. Schultz, Supervisor of the Montana Highway Patrol under date of April 28, 1953, be, and the same is hereby set aside.

Dated this 30th day of July, 1953.

/s/ J. W. SPEER,
Judge.

[Endorsed]: Filed Nov. 8, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS OR MAKE
MORE CERTAIN

Defendant, The Canadian Indemnity Company, moves the Court as follows:

I.

To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

II.

Or, if the motion to dismiss be denied, that the plaintiff be required to make a more definite statement showing:

a) The name of the person that Lenora Tacke "ordered" the Liability Policy of Insurance from on September 17th, 1952, as alleged in the complaint, page 2, paragraph III, line 11; also the place and manner of such "order" and persons present. None of these facts are shown.

b) The hour of the day on September 20th,

1952, that plaintiff was involved in the collision near the City of Great Falls, referred to page 2, line 31, of the complaint. This fact is not shown in the complaint.

c) Whether Lenora Tacke did not call at the office of Bill Kelly Realty on September 20th, 1952, after the accident, and request that the policy of insurance referred to be issued. This fact is not shown in the complaint.

d) When the policy of insurance was received by the plaintiff, and how, and when, it was executed and issued. The complaint does not show the fact in this respect or whether the policy was issued or delivered before or after the accident.

This motion is made under Federal Rule 12 of Civil Procedure, (b) (e) and (g).

HOFFMAN & CURE,

/s/ By H. B. HOFFMAN,

Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Nov. 30, 1954.

[Title of District Court and Cause.]

ORDER

The motions of the defendant in the above entitled cause are before the court on briefs filed by counsel for the respective parties; in paragraph I of the motion defendant moves the dismissal of the action on the ground that the complaint fails to

state a claim against the defendant upon which relief can be granted; and in paragraph II, that if the motion above is denied that plaintiff be required to make a more definite statement as indicated by the several proposals noted as a, b, c and d.

The court has considered the complaint, motions and briefs of counsel, and being duly advised, and good cause appearing therefor, is now of the opinion that the plaintiff should not be summarily dismissed but should be accorded his day in court and allowed to present his proof under the allegations of the complaint, and that defendant should be required to file its answer to the complaint and submit its proof thereunder.

This case presents a situation very much in point with substantial authority; the court having specially in mind the well-known decision of Judge Sanborn of the Eighth Circuit Court of Appeals in *Leimer v. State Mutual Life Assurance Co.*, 108 Fed. (2) 302.

The court believes the allegations of the complaint are sufficiently explicit and informative; if further information is desired the rules of discovery are available. Consequently, in view of the foregoing, the motions under paragraphs I and II are overruled with 20 days to answer upon receipt of notice hereof.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed March 19, 1955.

[Title of District Court and Cause.]

ANSWER

For its answer to plaintiff's complaint filed herein, defendant denies each and every allegation, matter, fact and thing in said complaint contained, save and except:

a) Admits the allegations of paragraphs I, II, VIII, and that the policy of insurance contained the clause set out in paragraph X thereof.

b) Admits that the policy referred to in paragraph III, of which Exhibit "A" attached to plaintiff's complaint is a copy, issued September 20th, 1952, out of the office of Bill Kelly Realty, and alleges in respect thereto that the written application for said policy was made and accepted at the hour of 9:30 A.M. September 20th, 1952, at which time Bill Kelly Realty agreed to, and subsequently on that day did issue the said policy; that the automobile accident referred to in the plaintiff's complaint had occurred about the hour of 8:20 A.M. that day and application for said policy was made by the plaintiff, acting through his wife, Lenora Tacke, at a time when the plaintiff knew that said accident had occurred, and said application was accepted and the promise to issue said policy was made without disclosure of that fact to Bill Kelly Realty and without knowledge on the part of said agency or on the part of the defendant that the accident and consequent loss or damage had already occurred when the promise to issue the policy upon said application was made.

c) Admits the premium on said policy was \$39.00, which the plaintiff advanced to the defendant.

d) Admits that on or about December 10th, 1952, H. S. Dotson Co. issued the notice of cancellation referred to in paragraph VI of the complaint, and alleges in respect thereof that said notice was given to the plaintiff under the belief that the policy of insurance covered any and all losses that might have occurred between the time of the acceptance of the application for said policy September 20th, 1952, at 9:30 A.M. and the date designated for cancellation, and alleges in respect thereof that the defendant notified the plaintiff prior thereto that the policy of insurance did not cover the loss referred to in plaintiff's complaint, and which occurred about 8:20 A.M. the morning of September 20th, 1952.

e) Admits that defendant had notice of the filing of a complaint against the plaintiff referred to in paragraph VII of said complaint, and that the defendant declined and refused to defend said suit on behalf of the plaintiff and that the defendant then tendered to the plaintiff the entire premium upon said policy, and defendant alleges that at said time defendant gave notice to the plaintiff that its reason for refusal to defend said suit was that the plaintiff had knowledge of the loss referred to in his complaint at the time application for said policy was made and that he concealed such fact, by virtue whereof the policy had no binding force or

effect as coverage for the accident that had previously occurred.

f) Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph IX thereof.

g) Admits that defendant had knowledge of the acts and procedures referred to in paragraph XI of the complaint, but especially denies that the action of the District Court for Cascade County was an adjudication of the validity of the policy of insurance referred to, or that there was any judicial determination to that effect, as alleged by the plaintiff.

Further Answering Said Complaint, and as an Affirmative Defense Thereto, the Defendant Alleges:

I.

That the application for the insurance policy referred to in plaintiff's complaint was made to the Bill Kelly Realty, the agent of the defendant, upon the 20th day of September, 1952, at the hour of 9:30 A.M.; that said Bill Kelly Realty then and there accepted said application and agreed to issue the policy of insurance referred to in plaintiff's complaint.

II.

That at the time said application so made was accepted, neither the defendant nor said Bill Kelly Realty knew that the accident referred to in plaintiff's complaint had already occurred; that said ac-

cident actually had occurred at approximately 8:20 A.M. of September 20th, 1952.

III.

That said application for said policy upon September 20th, 1952, was made by the plaintiff's wife, Lenora Tacke, and at the time she made said application for insurance, the plaintiff knew that the collision referred to in the plaintiff's complaint had already occurred and the losses and damages caused thereby had been sustained.

IV.

That the fact that said accident had occurred and said damages and losses had been sustained was, in fact, concealed from said Bill Kelly Realty and the defendant until after the Bill Kelly Realty had accepted the application and agreed to issue the policy.

V.

That upon October 27th, 1952, the defendant, by its agent thereunto duly authorized, gave notice to the plaintiff that his policy of insurance was not in effect at the time the said loss occurred.

Wherefore, having fully answered, defendant prays that the plaintiff take nothing herein and that defendant may be dismissed hence with its costs.

HOFFMAN & CURE,

/s/ By H. B. HOFFMAN,

Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 11, 1955.

[Title of District Court and Cause.]

OPINION

The objective sought in the above entitled action by plaintiff is a declaratory judgment determining the validity of a policy of automobile insurance issued by the defendant through its agent covering an automobile that was involved in an accident which is alleged to have occurred before the policy was written. The said policy of insurance was written to become effective at 12:01 A.M. September 20, 1952, and the defendant claims the accident in which the aforesaid automobile was damaged occurred several hours before the policy of insurance was issued, and from the evidence it appears that the issuing agent knew the accident had occurred at the time the policy was delivered to plaintiff who paid the premium in full for one year, which was accepted by defendant's agent. The policy was dated to become in force several hours before the accident occurred, which is fixed by the evidence at about 8:20 A.M. or 8:40 A.M. on September 20, 1952.

On December 10th, 1952, notice of cancellation was given by defendant, in compliance with the terms of the policy for its cancellation, to become effective December 21, 1952. On cancellation of the policy the defendant retained the premium on the policy for the three months' period the policy was in force, to wit: from 12:01 A.M. September 20th, 1952 to December 21, 1952. The plaintiff was the owner of, and driving, the automobile involved in the accident of September 20th, 1952, and the Mon-

tana Highway Patrol, being advised by defendant that plaintiff had no valid automobile liability insurance policy in its company, issued an order of suspension under the Montana Statute.

Plaintiff took an appeal from the order of the said Highway Patrol to the State District Court of Cascade County, which was heard and decided by Honorable James W. Speer, Judge of said Court, who held that the plaintiff, Leo Tacke, was insured at the time of the accident aforesaid.

The defendant, having told the Highway Patrol that plaintiff had no liability insurance, was duly notified to appear before Judge Speer at the hearing on the validity of the insurance policy issued by the defendant company, but the defendant did not appear at the hearing and Judge Speer held that the plaintiff had an automobile liability insurance policy valid on its face.

Following the decision of Judge Speer the plaintiff through his counsel notified the defendant of the decision on the validity of the policy and requested the defendant to perform the provisions of the contract in actions brought against him arising out of the accident aforesaid, and the defendant failed to defend plaintiff against these actions as provided in the insurance policy.

It appears that shortly before appearance of defendant would have been due in the State Court in June 1954 counsel for the defendant with his personal check tried to refund the earned premium for the period fixed by the defendant in the insurance policy from 12:01 A.M. September 20, to 12:01

A.M. December 21st, 1952, the date of cancellation, but the refund was returned.

It would seem that the defendant by accepting the entire premium on the policy for the full year and retaining it for the period of three months would be bound by the obligations assumed in the contract of insurance. While there was no fraud alleged here it has been held that where fraud was discovered by a party to a contract and he accepted the consideration therefor and applied the same to his own use, the fraud was waived. Any unreasonable delay in moving for redress where fraud or mistake is discovered by a party to a contract may be held to be consent or acceptance notwithstanding the fraud or mistake.

Leo Tacke, the plaintiff, and his wife both testified to conversations with Mr. Kelly of the realty company, about taking out insurance with him on this same automobile that was later engaged in the accident aforesaid; while Mr. Kelly either denies or says he does not remember any such conversations, he does recall the meetings with Mr. and Mrs. Tacke as testified to by them; if these conversations were true, then that would perhaps account to some extent for Mr. Tacke making a timely report to him of the accident and for his willingness to issue the policy in question for 12:01 A.M. September 20th, 1952, although his secretary said she told Mr. Kelly at the time of her suspicion that an accident had already occurred.

It appears that counsel for the defendant decided to tender a return of the premium June 11, 1954,

which was 20 months after the policy had been issued, which was not accepted.

The defendant could have promptly rescinded the contract of insurance upon receipt of the report of its agent following an investigation of the accident which was begun two days after the accident occurred on September 22, 1952. There is no showing of reasonable diligence here either as to rescission or cancellation of the contract. Rescission must be made promptly upon discovering the facts if the one making the discovery "is free from duress, menace, undue influence, or disability, and is aware of his right to rescind", and furthermore everything received under the contract must be restored, all in accordance with section 13-905 (7565) R.C.M. 1947.

Counsel state in the brief that: "The policy in this case was delivered by mail after the insurance company through its agent, Bill Kelly Realty, knew full well that by delivering the policy the company was assuming a liability for an event that occurred before delivery of the policy. There is neither public policy nor law to prevent the assuming of a liability in this matter. The statute of frauds does require a writing. The provisions of the statute of frauds are complied with in this case. There is a written contract." Citing *Blashfield's Cyclopedia of Automobile Law and Practice*, Vol. 6, Sec. 3923, P. 587, 591, and 44 C.J.S. 1261, 1267.

Mrs. Lenora A. Tacke, wife of the plaintiff, Leo Tacke, testified concerning three conversations over the telephone with Mr. Kelly or representatives of

his office in connection with ordering the policy of liability insurance, not including the conversations with the real estate salesman, the first conversation originated when Mr. Kelly telephoned and asked Mrs. Tacke to have Leo Tacke give him an estimate on some lawn work in the back of his rental property, at which time Mrs. Tacke told Mr. Kelly that in appreciation for giving them the lawn work they would take out insurance on the 1948 Chevrolet with him and Mr. Kelly said when they were ready it would be fine; that on September 17th, 1952, Mr. Kelly again telephoned and asked Mrs. Tacke to have her father use his tractor and equipment to clear weeds and rubbish off from a piece of property he had for sale that afternoon and on the occasion of that conversation Mrs. Tacke requested Mr. Kelly to be sure Leo is covered by insurance and Mr. Kelly thanked her; that the policy had not been received and on Saturday morning, September 20th, 1952, she phoned Mr. Kelly's office before 8:30 A.M. and the line was busy and called again a few minutes after 9:00 A.M. to inquire why the insurance policy had not come and talked with Mrs. Halverson to confirm her previous request to Mr. Kelly; that Mrs. Halverson said she would ask Kelly when he came in and in the meantime she would see that it was gotten right out, and took the information required for liability insurance required by the State law; that at the time she made the telephone calls on the morning of September 20th, 1952, she did not know that an accident had occurred, but was later notified by an unidentified

lady whose call came ten or fifteen minutes after the conversation with Mrs. Halverson.

Although this case presents a rather unusual situation in respect to the facts it does seem clearly to appear from a consideration of all the evidence that the defendant by its own acts is estopped from denying the validity of its contract of insurance, and the preponderance of the evidence appears to favor the plaintiff, and such is the decision of the court herein. On the subject of attorney's fees, from the arguments of counsel and authorities cited on both sides, and legal services rendered which were made necessary by reason of the refusal or failure of defendant to act in a timely manner or at all the court will fix the attorney's fees at fifteen hundred dollars, being a reasonable sum for the legal services of counsel as aforesaid, and such is the order and decision of the court herein. Exceptions allowed counsel.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed May 26, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was tried to the Court without a jury and the Court having considered the Briefs submitted by counsel and upon consideration of the

pleadings, records and the competent evidence herein and being fully advised, found issues of law and fact in favor of plaintiff and against the defendant as more fully appears in the Opinion of the Court heretofore filed herein on the 26th day of May, 1956. In accordance with said Opinion, the Court now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

The Court finds that:

1. This Court has jurisdiction hereof on the ground of diversity of citizenship and on the ground that the amount involved in the controversy, exclusive of interest and costs, was and is in excess of \$3,000.00.

2. The Bill Kelly Realty of Great Falls, Montana, was on the 20th day of September, 1952, an authorized representative of the defendant, with power to execute a contract of insurance.

3. The defendant issued to the plaintiff, a contract or policy of insurance, being an automobile policy, Policy Number 22 CA 3908 and plaintiff paid to the defendant, the premium for said insurance.

4. The defendant issued and delivered said policy of insurance to the plaintiff, effective 12:01 A.M., September 20, 1952, and for the term of one year and thereafter the defendant cancelled said policy of insurance in accordance with the terms of said

policy, and said cancellation became effective at 12:01 A.M., on the 21st day of December, 1952.

5. The policy of insurance referred to herein was and is a valid contract of insurance binding upon the defendant for the period for which the defendant retained the earned premium, that is, from 12:01 A.M., on September 20, 1952, to 12:01 A.M., December 21, 1952, and the defendant is liable and obligated in accordance with the terms of said policy of insurance for the insured period fixed by the defendant, 12:01 A.M., September 20, 1952 to 12:01 A.M., December 21, 1952.

6. The defendant failed and refused to assume its responsibility under and by virtue of the terms of the policy of insurance and it was necessary for plaintiff to employ attorneys to represent him in investigating the accident in which plaintiff was involved and wherein Pearl Kissee was injured, for which injuries she filed an action against the plaintiff, entitled Pearl Kissee vs. Leo Tacke, filed in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, and said attorneys were employed to furnish professional services to the plaintiff in connection with the said action and said accident and the plaintiff further was required to employ said attorneys to appeal the order of suspension of driver's license issued by the Montana Highway Patrol to the plaintiff and for other purposes, by reason of the failure and refusal of the defendant to comply with the terms of said policy of insurance.

7 The evidence preponderates in favor of the plaintiff and against the defendant.

8. A reasonable sum for the legal services of counsel employed by the plaintiff by reason of the failure and refusal of the defendant to comply with the terms of the said policy of insurance as here-inbefore referred to is the sum of \$1,500.00.

From the foregoing facts the Court draws the following:

Conclusions of Law

1. The Court has jurisdiction of the parties and subject matters herein.

2. That the contract of insurance, being Policy No. 22 Ca 3908, was and is a valid contract of insurance, from 12:01 A.M., September 20, 1952 to 12:01 A.M. December 21, 1952.

3. That plaintiff have and recover from the defendant reasonable attorneys' fees in the sum of \$1,500.00 together with plaintiff's costs necessarily incurred herein.

Let Judgment be entered accordingly.

Dated this 19th day of June, 1956.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed June 19, 1956.

In the United States District Court for the District
of Montana, Great Falls Division

Civil No. 1648

LEO TACKE,

Plaintiff,

vs.

THE CANADIAN INDEMNITY COMPANY,
Defendant.

JUDGMENT

This Cause came on regularly for trial before the Court sitting without a jury. The plaintiff was present in Court and represented by his counsel, Emmett C. Angland and William L. Baillie. The defendant was represented by its counsel, H. B. Hoffman and Orin R. Cure. Witnesses were sworn and testified. The cause was submitted to the Court for consideration and decision. Thereafter on the 26th day of May, 1956, the Court filed herein its Opinion and has filed its Findings of Fact and Conclusions of Law, to which documents now on file reference is hereby made as if the same were set out herein in exact words and figures. The Court in said documents found that the policy of liability insurance, being Policy Number 22 CA 3908, issued by the defendant to the plaintiff was and is a valid contract of insurance for the insured period 12:01 A.M., September 20, 1952, to 12:01 A.M., December 21, 1952, and the Court further found that the defendant is liable and obligated in accordance with the terms of said policy of insurance issued to plain-

tiff and the Court further found that plaintiff is entitled to recover from the defendant, reasonable attorney's fees in the sum of \$1,500.00 and that judgment should be entered for such sum and costs in favor of the plaintiff against the defendant.

Wherefore, It Is Ordered, Adjudged And Decreed that the policy of liability insurance issued by the defendant to the plaintiff was and is a valid contract of insurance for the insurance period 12:01 A.M., September 20, 1952, to 12:01 A.M., December 21, 1952.

It Is Further Ordered, Adjudged And Decreed that the plaintiff have and recover of and from the defendant, the sum of \$1,500.00 together with plaintiff's costs herein taxed at the sum of \$131.30, and that such judgment bear interest at the rate of six per cent per annum from date hereof until paid.

Dated this 19th day of June, 1956.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed, Entered and Noted in Civil Docket June 19, 1956.

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT

Defendant respectfully moves the court to make the following amendments, respectively:

First—Of the Findings of Fact:

a) That paragraph 3 thereof be amended to read:

“3. That upon September 20th, 1952, between 9:00 and 9:30 A.M., Lenora A. Tacke, the wife of the plaintiff, acting for and in behalf of the plaintiff, ordered out a policy of automobile insurance from Bill Kelly Realty, and upon inquiry from the latter as to whether an accident had occurred, Mrs. Tacke replied in the negative. Thereupon, Bill Kelly Realty agreed to, and did, issue Policy Number 22 CA 3908, wherein the policy period was from September 20, 1952, to September 20, 1953 (12:01 A.M. Standard time at the address of the named assured as stated therein), and mailed the policy to plaintiff that day.”

b) That paragraph 4 thereof be amended to read:

“4. That the automobile accident out of which liability coverage is claimed in this action occurred at, or before, 8:24 A.M. of September 20th, 1952. That plaintiff's written report of the accident to the insurance company, signed by him after reading it over and dated September 24th, 1952, contains the statement:

“ ‘Date of accident September 20, 1952, hour 9:30 o’clock A.M.’

“Thereafter, defendant cancelled said policy in accordance with the terms of said policy, and said cancellation became effective at 12:01 A.M. on the 21st day of December, 1952, and returned to plaintiff the unearned premium for the time subsequent to December 21st, 1952. The controversy was turned over to Hoffman and Cure thereafter, in behalf of defendant, and upon the 11th day of June, 1954, the latter returned to counsel for plaintiff their check for the remainder of the whole premium, in the sum of \$9.83, for reasons stated in their letter, as follows:

“ ‘Canadian Indemnity Company declines to defend this action (Kissee vs. Tacke) for the reason that the loss had already occurred when the policy issued and had, in fact, occurred before the policy was ordered out and . . . because he (Tacke) refuses to collaborate or cooperate with us, and has given us notice that you are his attorneys in the matter, and have always been his attorneys . . .

“ ‘Notice of cancellation of the policy was given by the company under erroneous information that the accident had actually occurred after the policy was ordered out September 20th, 1952, and that because thereof ten days notice of cancellation was necessary.’ ”

c) That paragraph 5 thereof be amended to read:

“5. That neither Bill Kelly Realty nor defendant had knowledge that the accident had occurred prior

to the application for the issuance, and the promise of Bill Kelly Realty to issue the policy, nor did they have notice of any facts that should have put them on inquiry as to the same. That plaintiff failed to communicate to defendant the fact that the loss had already occurred when application for the policy was made, September 20th, 1952, and the application was accepted by Bill Kelly Realty, by virtue whereof the policy of insurance never did cover the loss involved.”

d) That paragraph 6 thereof be amended to read:

“That defendant never did admit or assume responsibility or liability for this collision, and continues to admit or assume no liability arising therefrom.”

e) That paragraph 7 thereof be amended to read:

“The evidence preponderates in favor of the defendant and against the plaintiff.”

f) That paragraph 8 thereof be amended to read:

“A reasonable sum for the legal services of counsel employed by the plaintiff is the sum of \$1,500.00.”

Second—Of the Conclusions of Law

a) That paragraph 2 of the Conclusions of Law be amended to read:

“That the contract of insurance, being Policy No. 22 CA 3908, cannot be deemed or construed as covering the accident and ensuing damages or loss herein involved.”

b) That paragraph 3 of the Conclusions of Law be amended to read:

“That defendant have and recover from the plaintiff defendant’s costs necessarily incurred herein.”

Third—Of the Judgment:

That the Judgment be amended to conform to the requested amendments of the Findings of Fact and Conclusions of Law, aforesaid; that plaintiff’s complaint be dismissed, with costs to the defendant.

/s/ H. B. HOFFMAN,

/s/ ORIN R. CURE,

Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 26, 1956.

[Title of District Court and Cause.]

ORDER

In the above entitled cause motion by the defendant to amend the findings of fact, conclusions of law and judgment rendered therein has been submitted to the Court, supported and opposed by counsel for the respective parties to the action. As it appears to the Court all of the proposals of the defendant herein for amendment were questions raised and discussed in defendant’s brief filed following the trial of the case, and therefore have already been considered by the Court.

The facts and the law of this case seem to have been very fully briefed, and were given very careful thought by the Court before its decision was rendered.

Counsel for the plaintiff has quoted quite extensively from the Court's decision, claiming that these quotations will fully answer all of the contentions of the defendant; while they may not answer all of the proposals of the defendant the Court has heretofore given all of them consideration before deciding the case, and is of the same opinion now in respect to that decision as it was at the time it was rendered. Of course, like other human agents and agencies, the Court may be in error, and if so it can quite easily be corrected. The Court was much interested in the able arguments of counsel for both parties to the action and devoted considerable time in examining the unusual state of facts presented in the case, and to the law that to the Court seemed applicable, and being duly advised herein, and good cause appearing therefor, in the opinion of the Court the motion to amend aforesaid should be overruled and such is the Order of the Court herein.

Exceptions allowed counsel.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed June 27, 1957.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are jointly bound to pay to Leo Tacke, the plaintiff, the sum of \$2,000.00.

The condition of this bond is that whereas the defendant has appealed to the Court of Appeals for the Ninth Circuit from the judgment of this Court entered May 26th, 1956, if this defendant shall pay the amount of the final judgment herein, if his appeal shall be dismissed or the judgment affirmed or modified, together with all costs that may be awarded, then this bond is void, otherwise to be and remain in full force and effect.

THE CANADIAN INDEMNITY
COMPANY,

/s/ By HERMAN S. DOTSON,
General Agent.

[Seal] ANCHOR CASUALTY COMPANY,

/s/ By ARTHUR W. BACON,
Attorney in fact, Surety.

Approved this 25th day of July, 1956.

/s/ W. D. MURRAY,
Judge.

[Endorsed]: Filed July 25, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that The Canadian Indemnity Company, defendant above named, hereby appeals to the U. S. Court of Appeals for the Ninth Circuit from the final judgment entered on the 26th day of May, 1956, and from the order entered June 27, 1957, denying the motion of The Canadian In-

demnity Company to amend findings of fact, conclusions of law and judgment.

/s/ H. B. HOFFMAN,

/s/ ORIN R. CURE,

Attorneys for appellant, Canadian Indemnity Company.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 25, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the papers hereto annexed, to-wit:

Complaint; Motion to Dismiss or Make More Certain; Order Overruling Motion to Dismiss or Make More Certain; Answer; Decision; Findings of Fact and Conclusions of Law; Judgment; Motion to Amend Findings of Fact, Conclusions of Law and Judgment; Order Overruling Motion to Amend Findings of Fact, Conclusions of Law and Judgment; Supersedeas Bond; Notice of Appeal; Concise Statement of Points Relied upon by Appellant; Appellant's Designation of Record on Appeal, and Designation of Additional Portions of Record by Plaintiff-Appellee, and the accompany-

Appearances: Mr. Emmett C. Angland, Attorney at Law, Great Falls National Bank Building, Great Falls, Montana, and Mr. William L. Baillie, Attorney at Law, First National Bank Building, Great Falls, Montana, for plaintiff. Mr. H. G. Hoffman, of Hoffman and Cure, Attorneys at Law, First National Bank Building, Great Falls, Montana, for defendant. [1]*

The above entitled cause came on regularly for trial, before the court without a jury, commencing at 10:00 o'clock A.M. on July 28, 1955, at which time the following proceedings were had and done, to-wit:

The Court: Good morning gentlemen. Are you ready to proceed?

Mr. Angland: Plaintiff is ready, your Honor.

The Court: Defendant?

Mr. Hoffman: I believe the defendant is ready. Mr. Dotson of the Canadian Indemnity Company, the State Agent, told me that he would be in court this morning at 11:30; I don't see him but I am willing to proceed as it is.

The Court: Have you found him a man of his word usually?

Mr. Hoffman: I take it he will be here in a few minutes.

The Court: Well we will proceed with that understanding and perhaps you might make just a brief statement of the case for the record on both

* Page numbers appearing at bottom of page of Reporter's Original Transcript of Record.

sides and then we will have that for the introduction in the transcript.

Mr. Angland: May it please the court, this is a case for declaratory judgment, an action for declaratory judgment to determine the validity of an insurance policy. As we view it for an insurance policy for an insured period fixed by the company itself, and for which premium was received and up to the time, this time is still retained by [4] the insurance company. The case has some similarity I might say to the one your Honor decided in this court in *Fireman's Indemnity Company vs. Show*. We are dealing here as in that case—If you want the citation, Mr. Hoffman, it is 110 Fed. Supp. 523. That is a decision of this court. And in that case as in this case we are dealing with an agent authorized to enter into a contract of insurance; we likewise have in this case as in that case the law of waiver and estoppel. Now then you will find the facts briefly, and the only disputed fact as we view the case is a dispute as to the time of ordering the policy of insurance. The dispute on that question we don't believe in law is material at all, however, there will be evidence presented on that question. The fact is that the policy was issued September 20th, 1952; on its face it says that it is effective at 12:01 a.m. that date. It was issued for a period of one year. Three months later the insurance company, approximately three months, on December 10, 1952, the insurance company issued what is termed a notice of cancellation and said as of the face of the notice of cancellation "in accordance with the

terms of the policy". The policy is cancelled 10 days hence, December 21, 1952 at 12:01 a.m.

Following that cancellation the insurance company pro rated the premium. Now the insured, Mr. Tacke, sitting behind counsel here, had paid for the full year's premium. [5] The company pro rated the premium and retained the premium for the period from 12:01 a.m. September 20, 1952, to 12:01 a.m., December 21, 1952.

Thereafter the Highway Patrol of Montana issued what is termed an order of suspension. Probably your Honor is familiar with that law. There are three alternatives under our security requirement law.

The personal involved in an automobile accident, and Mr. Tacke had been involved in one on the date that the policy was issued, December 20, 1952. The Highway Patrol must find that there was a policy of insurance in effect or suspend the license of the driver for one year unless he puts up bond.

Now the Highway Patrol in this particular case issued the order of suspension directed to Mr. Tacke, and noted on the order that the Canadian Indemnity Company had advised them that Mr. Tacke had no insurance in effect at the time of the accident. The law permits an appeal from that decision of the Highway Patrol and an appeal was taken and the law requires that not only the Highway Patrol but any person in interest must be notified.

Now Mr. Baillie and I handled that matter and, of course, the records of court will be introduced

that shows and will show that the Canadian Indemnity Company was notified. [6]

Following the notification and the time set for hearing before Judge Speer a hearing was held and the Canadian Indemnity Company in effect defaulted; they didn't appear and didn't contest the action. So, of course, Judge Speer did what he must do under the circumstances what he must have done. He observed the policy of insurance appears to be effective on its face at 12:01 a.m. September 20, 1952, and he set aside the order of suspension.

Now the force and effect of that in law is that that is a determination by Judge Speer and we believe is an adjudication that Mr. Tacke was insured at the time of the accident on September 20, 1952. I don't believe any other result can be obtained no matter how it might be presented to your Honor. The Canadian Indemnity Company now was advised as I stated by official notice prior to that hearing.

Following that hearing and when Mr. Tacke was being threatened with suit arising out of the accident that occurred on September 20, 1952, we wrote the Canadian Indemnity Company under date of October 30, 1953. We advised the company of the decision of Judge Speer. We advised them that they had been notified. We advised them that Mr. Tacke was being threatened with a lawsuit and we at that time set a very nominal fee for having represented Mr. Tacke by reason of the breach of the contract of insurance by the [7] Canadian Indemnity Company. We advised the company at that

time we would accept \$1,500.00 as attorneys' fees. The company I suppose just brushed us off. I think they referred the case to present counsel, Mr. Hoffman. We accomplished nothing as a result of that.

Finally in May of 1954 Messrs. James and Scott, representing Pearl Kisse, who was injured in the accident that occurred on September 20, 1952, filed an action. Pearl Kisse sued Mr. Tacke on May 22, 1954. Now that is of some importance because following the service of summons and complaint on Tacke we forwarded to the insurance company the complaint and summons as we would do when he carried insurance. Three days before their appearance was due, the 20 days had expired, we received a response; the nature of the response was a shock to us and I am sure it will be to the court; an attempt was made to refund the earned premium for the insured period fixed by the insurance company from September 20, 1952, to December 21, 1952; they had retained the premium all that time, but after he was sued in the District Court in Cascade County the attempt was made to refund that earned premium. Well, of course, that was rejected; nothing else could be done.

Now following that we filed this action for declaratory judgment and we are asking that the defendant insurance company live up to the terms of its contract; that [8] is all we are asking for is that they live up to the terms of the contract, save and except we do believe under the decisions and laws of Montana and the federal law as well we are entitled now to reasonable attorneys' fees by

reason of the breach of contract up to this date. We have asked previously for a few and after we filed this suit we have asked for \$3,000.00 attorneys' fees, Mr. Baillie and myself. I might say to the court that there is no question here on the law of rescission. Under the law of rescission if there is any charge of fraud the person charging fraud must proceed expeditiously, and I find a general statement that is quite good on that. It says that the person charging the fraud may not speculate upon it and he may not lie in wait until time and a change make his interest plain and then make his——

Mr. Hoffman: May it please the court, may I inquire at this time whether it is permissible to argue the case?

The Court: No, it isn't necessary. What the court suggested was we just have a brief statement, an outline of the case. You can brief that later, Mr. Angland.

Mr. Angland: Very well, your Honor.

The Court: The authorities.

Mr. Angland: I merely wanted to call that to the court's attention so that we wouldn't unduly delay the trial [9] or wander beyond the scope of the issues in the case. I believe that that fairly states the facts, does it, Mr. Baillie or do you have something that might be added to that?

Mr. Baillie: I think that is very sufficient.

Mr. Hoffman: Well, if the court please, on the statement of the case just made to the court there is nothing for this court to adjudicate as to the

validity of this policy; Judge Speer has already done that if I understand his statement of the case clearly. Isn't that your position, Mr. Angland?

Mr. Angland: Not completely, no, Mr. Hoffman; there is an action on the adjudication of the facts; I think it is up to this court to determine whether or not there has been an adjudication by Judge Speer.

The Court: You challenge the question of adjudication, don't you?

Mr. Hoffman: I certainly do.

The Court: Yes, well then you don't need to dwell on that because that would be an issue to be determined.

Mr. Hoffman: But on his statement of the case he would have no right to adjudicate what has already been adjudicated so I was inquiring on that point on his statement of the case whether he is not out of court at this time and place on that point.

The Court: No, go ahead and make your statement of the defense. [10]

Mr. Hoffman: Their prayer in this court is that this court determine and declare and adjudicate the validity of this insurance policy, and declare that it was and is a valid contract of insurance of 12:01 a.m. September 20, 1952, and that the defendant is liable and obligated under the contract. Paragraph two of the prayer is for the \$3,000 attorneys' fees and paragraph three of the prayer is the prayer for general equitable relief.

Now in answer to the plaintiff's complaint we

take issue with Mr. Angland there is no question of fraud involved in this case.

We take issue with his statement that the issue is not raised in the pleadings.

Our position briefly is this: That this policy of insurance was applied for at 9:30 a.m. on September 20, 1952, that the accident actually had happened at about 8:20 that morning before the application was made.

We have a two-pointed defense. First that if the loss had occurred when we promised to issue the policy at 9:20 that morning that in any event a loss already having occurred it could not be insured.

Now it is true in the printed form of the policy they have the term of the policy from September 20, 1952, midnight the term of the policy, 12:00 o'clock a.m. in [11] the policy is a printed part of the policy but under the law you cannot cover a loss already occurred or having already occurred by the application after the loss occurs.

Now our position is that while this policy was not actually drawn up until some time between 10:00 o'clock and noon that morning that the effective time of the policy was when Mrs. Halverson, who was the writing agent in Kelly's office, told Mrs. Tacke on the telephone that the policy would issue and took for the terms and conditions of the policy information sufficient to issue the policy proper.

It is our position that that insurance became effective just as soon as that application was ac-

cepted and no matter when they issued the policy later. Now I don't feel that the court cares to hear any more at this time.

The Court: Very well, call your first witness.

Mr. Angland: Mr. Hoffman, will you take the stand, please?

H. B. HOFFMAN

having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Angland): Will you state your name, please? [12] A. H. B. Hoffman.

Q. And you are duly licensed to practice law in Montana, Mr. Hoffman? A. I am.

Q. You are representing the defendant in this matter?

A. Our firm is attorneys of record.

Q. For how long a time have you been representing the Canadian Indemnity Company by reason of the issuance by that company of a policy of insurance dated 12:01 a.m. September 20, 1952 and designated policy number 22 CA 3908?

A. I do not remember the date that matter was referred to us, Mr. Angland.

Q. Could you refer to your file and tell us approximately when you first began?

A. I believe I should be—I have a note here that the Canadian Indemnity Company forwarded some papers to me on June 30, 1953.

Q. June 30, 1953?

A. Now whether there was any preceding correspondence I am not sure. I don't find any in the

(Testimony of H. B. Hoffman.)

file there but I believe that is approximately the date this was referred to us.

Q. Yes, and since that time you have been representing the Canadian Indemnity Company in all matters concerning the issuance by that concern of this insurance policy?

A. Well we had limited instructions. I have been [13] representing the Canadian Indemnity Company since that time, not continuously.

Q. And that date is?

A. We completed our investigation and sent a statement and then it was reviewed later in our office.

Q. Yes, well that is June 30, 1953?

A. That is approximately when the matter and the papers were referred to us.

Q. Will you look, please, Mr. Hoffman, at what has been identified as Plaintiff's Exhibit No. 1 and state whether or not you know what that is?

A. I do.

Q. And is the signature that appears in the lower right-hand corner of that exhibit your signature?

A. That is my signature and my letter addressed to you and Mr. Baillie.

Q. Under date of June 11, 1954, isn't it?

A. That could be the date that it was dictated.

Mr. Angland: We will permit the court to read it and then we will offer it in evidence.

Mr. Angland: We offer in evidence Plaintiff's Exhibit No. 1.

(Testimony of H. B. Hoffman.)

The Court: Any objection?

Mr. Hoffman: I believe not.

The Court: Very well, it may be received in evidence. [14]

[See page 195.]

Mr. Angland: Now, Mr. Hoffman, have you produced in accordance with the notice to produce the check referred to in Plaintiff's Exhibit No. 1 in the sum of \$9.83.

Q. Directing your attention, Mr. Hoffman, to what has been identified as Plaintiff's Exhibit 2, will you state whether or not you know what that is?

A. That is the check that I enclosed with the letter and referred to in the letter marked Plaintiff's Exhibit No. 1 that had been enclosed with that letter.

Mr. Angland: We offer in evidence Plaintiff's Exhibit 2.

The Court: Any objection?

Mr. Hoffman: No.

The Court: It may be received.

[See page 196.]

Q. Now, Mr. Hoffman, Plaintiff's Exhibit 2 represents the amount of money retained by the Canadian Indemnity Company on the premium paid by Mr. Tacke for the period, for what we shall refer to as the insured period, is that the fact, Mr. Hoffman?

A. I have never computed that and issued that check on instructions. It is my understanding that

(Testimony of H. B. Hoffman.)

it is the balance of the premium that had not already been tendered, that was my understanding at the time.

Q. Now, Mr. Hoffman, the check, of course, Plaintiff's Exhibit No. 2 shows that it has never been cashed; it isn't [15] cancelled; that check was returned to you, was it not? A. Yes.

Q. And do you have the letter by which that check was returned to you?

A. I have it before me.

Mr. Angland: Yes, may I have it please.

Q. This Plaintiff's Exhibit 3 is the letter that you received and with which you received the return of the check identified as Plaintiff's Exhibit No. 2, isn't it? A. It is.

Mr. Hoffman: To which offer——

Mr. Angland: I haven't made the offer, Mr. Hoffman.

Mr. Hoffman: Well then we object to the court reading it if it isn't offered.

Mr. Angland: The court can't very well rule until it knows what is in the document.

Mr. Hoffman: We wish to call the court's attention to the very irregular method of getting this before the court without even offering it in evidence.

The Court: Well you object to it, Mr. Hoffman, do you?

Mr. Hoffman: He just stated he hasn't offered it in evidence.

(Testimony of H. B. Hoffman.)

Mr. Angland: I will at this time offer in evidence Plaintiff's Exhibit 3, your Honor.

Mr. Hoffman: And to which we object as being [16] a self-serving matter and having no relevancy or competency for any purpose.

The Court: I will overrule the objection and it may be admitted in evidence for what it is worth; it relates to this transaction about which you both have had correspondence.

[See page 197.]

Mr. Angland: That is all. That is all the questions we have at this time.

Mr. Hoffman: Mr. Cure is not in a position to examine me; he has had nothing to do with this case; he is sitting in for the trial.

The Court: Anything you want to state then the same as might be inquired into on cross examination why go ahead.

Mr. Hoffman: Yes.

Cross Examination

By Mr. Hoffman: The check.

Mr. Angland: I will get it for you, Mr. Hoffman.

By Mr. Hoffman: As I recall now this matter was first referred to our office about June, 1953, and with some preliminary consideration and the matter was held in abeyance as far as our office was concerned for a while, and it was reviewed in our office and after restudying the file forwarded I came to the conclusion——

(Testimony of H. B. Hoffman.)

Mr. Angland: Just a minute. Your Honor, I am [17] going to object to conclusions that Mr. Hoffman came to in his office or his surmises; we want the relationship.

The Court: You are coming upon legal arguments now and we will reserve all these legal arguments until the end of the case.

Mr. Hoffman: The reason this check was issued I am getting at——

Mr. Angland: Just a minute. Your Honor, I object to any explanation for the reason it was issued.

The Court: You issued the check at the direction of the company, didn't you?

Mr. Hoffman: No, they referred it to me and the matter was in my hands and I made the decision that that check should be issued.

The Court: That is enough for the record; you decided that check should be issued.

Mr. Hoffman: And the policy cancelled; it was issued in cancellation of the policy.

The Court: As a result of the investigation and thought about it?

Mr. Hoffman: Mr. Angland, do you have the letter I wrote accompanying this check?

Mr. Angland: I think that is right before you, Mr. Hoffman. The letter accompanying the check is June 11, 1954, Plaintiff's Exhibit No. 1. [18]

Mr. Hoffman: I think other than a statement how the check happened to issue is all I care to make.

The Court: That is sufficient.

VIOLA M. TOY

having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Baillie): Would you state your name, please? A. Viola M. Toy.

Q. And your occupation?

A. I am a Deputy in the District Court, Cascade County.

The Court: In the Clerk's office?

A. In the Clerk of the Court's office.

Q. Did you bring with you files in response to a subpoena issued through this court?

A. I did.

Q. Do you have File No. 39270 of the District Court of Cascade County? A. I have.

Q. And what is that file?

A. That file is the original legal documents on file in the Eighth Judicial District of Cascade County, Leo Tacke, appellant, vs. Glen M. Schultz, Montana Highway Patrol, respondent. [19] Register of Actions 62, page 530.

Q. And is that file the complete record of that case in your Clerk's office? A. It is, sir.

Q. Did you bring with you file No. 40243?

A. I have it, sir.

Q. Of the 8th Judicial District, in the District Court? A. I have it.

Q. And what is that file?

A. That is a file No. 42043 of the District Court, Eighth Judicial District, Pearl Kisse, Plaintiff,

(Testimony of Viola M. Toy.)

vs. Leo Tacke, Defendant, a damage action, filed in Register of Actions 64, page 223.

Q. And does that represent the complete file in the Clerk of the Court's office? A. Yes.

Mr. Baillie: Your Honor, we at this time ask the Plaintiff's Exhibit No. 4, file 39270, the original court file be admitted into evidence and we ask that a certified copy of the record be substituted and that the original may be withdrawn.

The Court: Any objection?

Mr. Hoffman: I want to see the exhibit, please, first.

The Court: Any objection? [20]

Mr. Hoffman: No objection.

The Court: It may be received under those circumstances.

Q. I hand you Plaintiff's Exhibit No. 4, would you please tell me what that is?

A. This is a certified copy of the original file, 39270.

Q. Certified by your office?

A. Certified by our office.

Q. I hand you Plaintiff's Exhibit No. 5, would you please tell the court what that is, please?

A. It is a certified copy of the 40243 original file.

Mr. Baillie: At this time we would like to offer in evidence Plaintiff's Exhibit No. 5 for file 40243 and ask leave to substitute the certified copy.

Mr. Hoffman: If the court please file 40243 is

(Testimony of Viola M. Toy.)

offered in evidence and I have not had an opportunity to examine it.

The Court: Is it before you now?

Mr. Hoffman: No, this is a substituted copy of it; he is proceeding on the theory that is the original court record. Are you offering it?

Mr. Baillie: I am offering it.

Mr. Hoffman: I misunderstood the question; I thought this was a certified copy.

The Court: No, he is offering the original and substituting the certified copy, isn't that it? [21]

Mr. Baillie: Yes. Mr. Hoffman has the original.

Mr. Hoffman: There is no objection.

The Court: It may be received in evidence.

Mr. Baillie: No further questions of this witness.

The Court: Any cross, Mr. Hoffman?

Mr. Hoffman: No.

TED JAMES

having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Angland): Will you state your name, please? A. Ted James.

Q. Where do you live, Mr. James?

A. Great Falls.

Q. And what business are you engaged in?

A. Attorney.

Q. Duly licensed to practice your profession in the State of Montana? A. Yes.

(Testimony of Ted James.)

Q. Mr. James, as a duly licensed attorney in the State of Montana, are you one of the attorneys representing Pearl Kissee who filed an action against Leo Tacke, being Cause No. 40243 in the District Court of the Eighth Judicial District? [22]

A. Yes.

Q. Mr. James, it appears that the file contains only the complaint and summons and though the case was filed in May of 1954 no appearance has been made by the defendant; will you state to the court what the situation is with respect to that matter?

A. My partner and I both knew that this—

Mr. Hoffman: Just a minute. If the court please, we don't believe that has any relevancy of any matter before the court at present.

Mr. Angland: If I may be heard on it, I will clarify it for the record.

The Court: It seems the answer is absent from the original file, is that it?

Mr. Angland: No, it isn't, your Honor. Mr. James and his associate, Mr. Scott, have refrained from taking a default against the defendant at the behest of Mr. Baillie and myself but he has been aware of the fact we have been representing Mr. Tacke for some period of time. We don't want to be charged with negligence in not handling the case.

The Court: Well you may make a record of it.

Q. (By Mr. Angland): Will you please just briefly state what the situation is, Mr. James?

(Testimony of Ted James.)

A. We knew that you and Mr. Baillie were both representing [23] Mr. Tacke's interests and you both had informed us there was a quarrel with the insurance company whether or not there was coverage on Mr. Tacke's vehicle at the time of the accident and at your request we did not take a default and merely allowed the matter to lay dormant pending a determination as to the validity of the insurance policy.

Q. Pending a decision in the case now on trial, isn't that the situation, Mr. James? A. Yes.

Q. Mr. James, can you recall when you first contacted either Mr. Baillie or myself concerning your representation of Pearl Kissee?

A. I believe it was sometime in the month of April, 1954; I am not positive.

Q. Did you have any discussion concerning the possibility of settling the damage claim that Mrs. Kissee had against Mr. Tacke?

A. Yes, we discussed that on several occasions.

Mr. Hoffman: If the court please, we object to going into these collateral matters.

Mr. Angland: I don't believe this is collateral, your Honor. We are asking for attorneys' fees here as well.

The Court: Overrule the objection; you may proceed with it. [24]

Q. (By Mr. Angland): Did we discuss the matter with you?

A. Yes, on numerous occasions.

Q. Do you recall whether any discussion was

(Testimony of Ted James.)

had with you concerning the interest of the insurance adjuster, W. D. Hirst, in this matter?

Mr. Hoffman: Now if the court please, I don't know how far they are going into collateral matters here when it is nothing in issue; if they want to testify what their reasonable attorneys' fees would be I suppose that is an issue.

Mr. Angland: I will withdraw the last question, your Honor.

Q. (By Mr. Angland): Mr. James, is there another case in addition to the Pearl Kissee vs. Tacke filed and pending in the District Court of the Eighth Judicial District? A. Yes.

Q. And what is the name of that case?

A. Ed Kissee vs. Tacke.

Q. And does that arise out of the same accident or not?

A. Yes, out of the same accident.

Q. Have you had summons served on Mr. Tacke in that case? A. No. [25]

Q. And why not?

A. There was no hurry to do it and we had summons issued and we were waiting for the determination of this particular case and we were in no great hurry to serve summons.

Mr. Angland: You may cross examine.

Cross Examination

Q. (By Mr. Hoffman): Mr. James, do you know about when Mr. Tacke hired Mr. Angland and Mr. Baillie as his attorneys?

(Testimony of Ted James.)

A. Oh, not exactly, I presume it was about the time that they had the hearing in Judge Speer's court, and that would have been before I talked to Mr. Angland because that is when and how I knew Mr. Angland was involved in it.

Q. Did you know that and that some time before that Mr. Angland or Mr. Baillie or both had gone down to Helena or both had gone down to Helena before the Commissioner of Insurance to exclude the Canadian Indemnity Company from doing business in the State of Montana?

Mr. Angland: Now just a minute. Your Honor, I object to the question; I object to the form of the question and on the further reason it is not the truth; I have never appeared before the Insurance Commissioner concerning this [26] matter and I don't want counsel inferring any such thing.

The Court: It isn't proper cross examination.

Mr. Angland: It most certainly isn't.

Mr. Hoffman: In the light of Mr. Angland's statement to the court I wish to inquire whether or not he or Mr. Baillie did not consult with Mr. Kelly in the Commissioner's office about this matter?

Mr. Angland: Mr. Hoffman, I don't know about Mr. Baillie and it doesn't make any difference if he had, I didn't. I have written to Mr. Kelly in the Insurance Commissioner's office because I believe then and I believe now that the Insurance Commissioner of Montana should have revoked the

(Testimony of Ted James.)

license of that company to do business in the State because of their handling of this case.

Mr. Hoffman: That is all I wanted to bring out was the statement he just made.

The Court: Well just proceed.

Q. So that you don't know the exact date when Mr. Angland entered into the case for Mr. Tacke then, do you? A. No, I don't.

Mr. Hoffman: That is all.

Mr. Angland: That is all.

The Court: Call your next witness. [27]

LEO TACKE

having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Baillie): Would you state your name? A. Leo Tacke.

Q. And your address.

A. 124—20th Street Southwest.

Q. That is in Great Falls? A. Right.

Q. What is your occupation?

A. Body repairman and truck mechanic.

Q. Where do you work?

A. International Harvester Company.

Q. Are you married, Mr. Tacke?

A. Yes, sir.

Q. Do you have a family?

A. Yes, we have 6 children.

Q. Are you the plaintiff, Mr. Tacke, in an action entitled Leo Tacke vs. Canadian Indemnity Company which is now before this court?

(Testimony of Leo Tacke.)

A. Yes.

Q. Mr. Tacke, would you please tell the court—let's rephrase the question—did you at any time, Mr. Tacke have any conversation with Bill Kelly or Bill Kelly Realty Company [28] of Great Falls concerning a certain policy of insurance on a '48 Chevrolet automobile? A. Yes, sir.

Q. And can you recall approximately the time of the first conversation or the conversation?

A. The first conversation naming the '48 Chevrolet to the best of my recollection is about two weeks before the accident, possibly three weeks.

Q. And what was the date of the accident?

A. September 20th, 1952.

Q. And where did this conversation take place?

A. I was putting in a lawn; he was up there where I was putting in the lawn.

Q. Mr. Kelly? A. Mr. Kelly.

Q. And you say you were putting in a lawn, was that also your occupation at that time?

A. I did that part time.

Q. And approximately where did this conversation take place?

A. On the lawn approximately 20th Street and Sixth Avenue South; I could place it but not the exact address.

Q. And what was this conversation?

A. I advised Mr. Kelly that we would insure the '48 Chevrolet which we were repairing with him. [29]

Q. Did you order the insurance at that time?

(Testimony of Leo Tacke.)

Mr. Hoffman: Just a minute. We ask that if that is a conclusion, we ask for the conversation.

The Court: Yes, state the conversation.

Q. And what other conversation was there?

A. I don't understand.

Q. Was there any other conversation at that time with Mr. Kelly? A. About insurance?

Q. Yes.

A. Yes, Mr. Kelly had agreed to pay me a commission on any mostly real estate that I listed, especially listings that I brought to his office. We expressed in this conversation that I appreciate this offer as a result of appreciation the policy on this car would be written with him.

Q. And was there any other conversation then concerning the insurance at that time?

A. At present I don't recall it.

Q. And did you at that time own a '48 Chevrolet automobile? A. Yes.

Q. Did you own any other automobile?

A. Yes, I was driving at that time a '38 Plymouth.

Q. And were you at that time driving the '48 Chevrolet? A. No.

Q. And did you have any other conversations with Mr. [30] Kelly or a representative of his office concerning this insurance policy in question?

A. Yes.

Q. When was that?

A. About a week later.

Q. And where was that conversation?

(Testimony of Leo Tacke.)

A. As I remember on Kelly's front lawn, his home addressed front lawn.

Q. And what were you doing at that time, how did you happen to be there?

A. I had put a lawn on Mr. Kelly's property and he stopped there and he paid me.

Q. And what was the conversation at that time concerning the insurance in question?

A. That the '48 Chevrolet which we were rebuilding from a wreck I had bought it as a salvage wreck, would be in running, in driving shape very shortly, within a matter of a few days and we were interested to know that he was covering it, and further we made further arrangements on how the policy would be paid.

Mr. Hoffman: Just a minute, please. We ask that the conversation be given and not his conclusions as to what was done.

The Court: Yes.

Q. You stated that you wished a policy of insurance to [31] be issued to be made available, is that what you said? A. Correct.

Q. And what other conversation was there?

A. That and as to the means of how the policy would be paid.

Q. And what was that conversation?

A. I had given Mr. Kelly a party that was interested in buying a lot and they had expressed to me appreciation for service I had rendered them and in return they said—

Mr. Hoffman: Just a minute, please. He is

(Testimony of Leo Tacke.)

going into a lot of hearsay; the conversation between Mr. Kelly and this witness.

The Court: Yes.

A. That he would be paid out of the commission on a lot that I was delivering to him for sale.

Q. And was there any other conversation as such concerning the policy at that time?

A. I don't recall it.

Q. And in referring to the date of the accident which you testified here was September 20, 1952 about how long prior to that accident did this second conversation take place?

A. About a week.

Q. And did you have any other conversations concerning this insurance with Mr. Kelly or a representative of his office? [32]

A. Not myself personally.

Q. Mr. Tacke, on September 20, 1952, you have testified that was the date of the accident, would you please indicate briefly the facts surrounding that accident? A. We——

The Court: Who do you mean by "we?"

A. I am sorry. I should say I and, my son and I left home to go to work.

Q. About what time did you leave home?

A. My wife, my son and I have established that time at——

Mr. Hoffman: Just a minute.

The Court: Just answer the question.

A. About 8:30.

Q. 8:30 A.M. or P.M.? A. A.M.

(Testimony of Leo Tacke.)

Q. And that was the morning of September 20, 1952? A. Yes.

Q. And what automobile did you drive that morning? A. The '48 Chevrolet.

Q. And why didn't you drive the Plymouth automobile which you also owned?

Mr. Hoffman: To which we object as not relevant.

The Court: Sustain the objection.

Q. And where did this accident occur?

A. The county road and 15th Street just south of Great [33] Falls.

Q. Do you know approximately when the accident occurred, the time? A. 8:40.

Q. And where did you or what happened following the accident?

A. I was unconscious and was taken to the hospital in an unconscious state.

Q. What hospital? A. The Deaconess.

Q. And how long were you in the hospital?

A. Until shortly before noon.

Q. And what did you do when you were dismissed from the hospital?

A. Went down, as I remember I stopped on the way home and reported the accident and the patrolman took me home and he took me down to the judge.

Q. And did you report the accident did you say?

A. As I remember I reported the accident on the way home.

Q. Where? A. At Kelly's office.

(Testimony of Leo Tacke.)

Q. And about what time would that be that you reported the accident?

A. Between 11 and 12, probably about 11:30.

Q. I hand you Plaintiff's Exhibit No. 6, Mr. Tacke, would you please tell the court what that is?

A. This is the insurance policy we received from Kelly as covering the 1948 Chevrolet.

Q. Covering the 1948 Chevrolet?

A. Correct.

Q. And what is the policy number?

A. 22 CA 3908.

Q. And the effective date of the policy as appears on the policy?

A. September 20th, 1952, 12:01 A.M. standard time.

Q. The accident occurred at what time again?

A. 8:20 September 20th or 8:40.

Q. This is the original and only policy which you received on this automobile at that time?

A. Right.

Mr. Baillie: We would like to admit this policy in evidence, your Honor.

Mr. Hoffman: There is no objection to the policy; that is set up in the complaint?

Mr. Angland: Yes.

Mr. Baillie: Same policy.

The Court: No objection?

Mr. Hoffman: No objection.

The Court: It may be received in evidence. [35]

[See page 12.]

Q. (By Mr. Baillie): Mr. Tacke, how did you

(Testimony of Leo Tacke.)

receive this policy? A. In the mail.

Q. I hand you Plaintiff's proposed Exhibit No. 7, would you please tell the court what that is?

A. This is the envelope in which we received the policy.

Q. And what is the postmark on that envelope?

A. September 20, 5:00 P.M., 1952.

Q. And this is from whom?

A. Bill Kelly Realty.

Q. Addressed to whom? A. Leo Tacke.

Mr. Baillie: We ask that this be admitted as evidence, Exhibit No. 7.

Mr. Hoffman: No objection.

The Court: It may be received in evidence.

[See page 199.]

The Court: We will have to take a recess. (11:00 A.M.)

Court resumed, pursuant to recess, at 11:20 A.M., at which time all counsel and parties were present.

The Court: Proceed, gentlemen.

LEO TACKE

resumed the stand and testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Baillie): Mr. Tacke, I hand you Plaintiff's proposed Exhibit No. 8, would you please tell the court what that is?

A. This is the receipt for \$39.00 that I received from Kelly's office in payment for the insurance policy.

(Testimony of Leo Tacke.)

Q. And what is the date of that receipt?

A. September 22, 1952.

Q. Signed by whom? A. J. Halverson.

Q. What is the receipt number?

A. Receipt No. 1849.

Q. And did you actually pay a premium for this policy? A. Yes.

Q. And when did you pay this money, did you pay it on the date indicated on the receipt?

A. On Monday, September 22nd at noon.

Q. And how did you make this payment?

A. By cash in the office.

Q. In Bill Kelly's office? A. Right.

Q. And was this the entire premium for the policy for the full year? A. Right.

Mr. Baillie: We offer Plaintiff's Exhibit 8 in evidence.

Mr. Hoffman: No objection. [37]

The Court: It may be received in evidence.

[See page 200.]

Q. (By Mr. Baillie): We will hand you Plaintiff's Exhibit No. 9, Mr. Tacke, would you please tell the court what that exhibit is?

A. It is a notice of cancellation of the insurance policy; it is dated December 10th, 1952.

Q. And to whom is that notice of cancellation addressed? A. To myself, Leo Tacke.

Q. And how did you receive that notice of cancellation? A. As I remember in the mail.

Q. And what is the date of that notice?

A. December 10th, 1952.

(Testimony of Leo Tacke.)

Q. And you believe you received it in due course of the mail? A. As I remember.

Q. And you know approximately when you might have received it?

A. Shortly after December 10th.

Q. Of 1952? A. Of 1952.

Q. And will you tell the court what the notice of cancellation states on what it is?

A. Under the terms——

Mr. Hoffman: Just a minute, please. We ask to see it first. [38]

The Court: Yes, you better show it to counsel.

Mr. Baillie: We will offer that in evidence, Exhibit No. 9.

Mr. Hoffman: No objection.

The Court: It may be received in evidence.

Q. (By Mr. Baillie): And I hand you Exhibit No. 9, would you please tell the court what the notice of cancellation states?

A. Under the terms——

Mr. Hoffman: Just a minute, please; the instrument speaks for itself.

The Court: Well let him read it; it is short, isn't it?

Mr. Baillie: Very short.

A. Under the terms of automobile policy No. 22 CA 3908 the companies give you notice of their desire to cancel and do hereby cancel the said policy, including any and all endorsements or certificates attached thereto, cancellation to become effective as of 12:01 A.M. of the 21st day of December,

(Testimony of Leo Tacke.)

1952, standard time. It is signed by H. S. Dotson Company, General Agent.

Q. Mr. Tacke, did you ever get this \$39.00 back that you paid for this policy? A. No.

Q. Did you get any portion of the \$39.00 back?

A. Yes. [39]

Q. And approximately when did you receive that portion?

A. Either December or January.

Q. December of what year?

A. December of '52 or January of '53.

Q. And do you recall the amount that was returned to you? A. Approximately \$27.00.

Q. And how did you receive that money?

A. By a check in the Kelly, the agent Bill Kelly office.

Q. Was it delivered to you personally?

A. Yes.

Q. And have you ever received the other remaining balance? A. No.

Q. Mr. Tacke, I hand you Plaintiff's proposed Exhibit No. 10, would you please tell the court what that exhibit is?

A. It is an order of suspension of my driver's license.

Q. And what is the date of that order of suspension? A. April 28, 1953.

Q. And is that the original order of suspension which you received? A. Yes.

Q. And how did you receive that order of suspension? A. By mail.

(Testimony of Leo Tacke.)

Q. Approximately when? [40]

A. The latter part of April.

Q. Of what year? A. 1953.

Q. And indicating that was an order of suspension suspending what?

A. My driver's license.

Mr. Baillie: We offer Plaintiff's proposed Exhibit No. 10 in evidence.

Mr. Hoffman: If the court please, we are not contesting the fact that there was a suspension order issued at some time by Mr. Schultz but this apparently is not signed.

The Court: Do you know the party who issued it?

Mr. Hoffman: It is signed by typewriter Glenn M. Schultz, Supervisor. I wish to call the court's attention to it but we are not contesting that this suspension order issued.

Q. (By Mr. Baillie): Is this the only suspension order you ever received? A. Yes, sir.

Q. And this is the original which was sent to you? A. Yes, sir.

Mr. Baillie: Would you care to check it?

The Court: In view of the admission of counsel for the defendant that this situation isn't contested I will allow this to go in for whatever it may be worth. [41]

Mr. Hoffman: It is my understanding that such an order did issue.

The Court: Well proceed, Mr. Baillie.

Q. (By Mr. Baillie): Mr. Tacke, I believe you

(Testimony of Leo Tacke.)

testified you had reported the accident to the Bill Kelly Agency, is that correct, the same date as the accident? A. Yes.

Q. And do you know whether or let's say were you contacted by a representative of the Canadian Indemnity Company for the purpose of investigating the accident? A. Yes.

Q. And approximately when were you contacted? A. I believe about a week later.

Q. And where were you contacted?

A. Word was left for me to come to the Montana Claims Office.

Q. And did you go to the Montana Claims office? A. I did.

Q. And did you offer information concerning the facts of the accident requested from you?

A. Yes.

Q. Did you freely give this information?

A. Yes.

Q. Did you sign all documents requested to be signed by [42] the company? A. Yes.

Q. Do you feel that you cooperated fully and complete with the company in their investigation?

Mr. Hoffman: Just a minute, please. The report itself will be the best evidence as to what he did.

The Court: Yes, I think perhaps——

Mr. Hoffman: We have the report here, Mr. Baillie, if you want to introduce it in evidence.

Mr. Baillie: No, sir.

Q. (By Mr. Baillie): Mr. Tacke, when were

(Testimony of Leo Tacke.)

you, do you recall if you were ever notified or when you were notified concerning the fact that the policy wouldn't cover this particular accident?

A. Yes.

Q. And who notified you of that?

A. The adjuster or manager of the Adjustment Bureau.

Q. And approximately when was that?

A. About a week I believe after I made the, after I was to their office.

Q. And where was that, would you say where was that conversation?

A. In the International Harvester Shop.

Q. And who was present?

A. To the best of my knowledge no one but the adjuster [43] and myself.

Q. And what was the conversation at that time?

A. The adjuster came in.

Q. What was the name of this adjuster?

A. Mr. Hirst.

Q. And what was the conversation?

A. Mr. Hirst, the adjuster, came in and he had a paper of some type in his hand and he made reference to the claim he was handling, and says, why this is a case for fraud, and it was rather surprising to me, and I said, how do you get that, or something to that effect, and he said, you have a solicitor's license with Yeoman, and I said, yes, I did have.

Mr. Hoffman: If the court please, I don't know what this conversation is getting into but it ap-

(Testimony of Leo Tacke.)

pears to have collateral matters and we object unless it belongs to an issue in this case.

The Court: I don't know yet whether it is collateral or not, maybe some explanation will clear the atmosphere. What is the purpose of it?

Mr. Angland: The purpose of this evidence, your Honor, is to show that the company knew of any contention of fraud in the issuance of this policy within a very short time after the issuance of the policy and the accident; notwithstanding that fact more than two months, almost three [44] months later they cancel the policy. Now they are attempting to take the position that the policy never came into existence; that apparently is Mr. Hoffman's position from his opening statement and we take the position they knew all about the matter at the time of the cancellation at the time of the delivery of the portion of the premium that was returned at the time of cancellation.

The Court: Very well, you may show it.

Q. (By Mr. Baillie): And was there any other conversation at that time concerning the alleged fraud? A. Yes.

Q. And what was it?

A. I advised Mr. Hirst that I considered his threat; and he said that the company probably, Mr. Hirst, the adjuster, advised me that the company probably would not prosecute provided we immediately dropped the claim.

Q. Prosecute?

A. Prosecute Mrs. Tacke and I on a fraud

(Testimony of Leo Tacke.)

charge for presenting the claim to the policy. I advised Mr. Hirst that I considered that a bluff, that I considered bluffing as cowardice and that was the end of the conversation.

Q. And was there any other conversation with representatives of the Canadian Indemnity Company wherein this matter came up? [45]

A. The matter of fraud?

Q. Yes. A. Yes.

Q. And when and where?

A. Sometime later in December in the office of Agent Bill Kelly the——

Mr. Hoffman: What year, please?

Q. What year was this conversation?

A. December, 1952.

Q. And who was present at that time?

A. Bill Kelly, Jean Halverson and myself.

Q. Continue.

A. I had gone around to the people who had seen or had been established with knowing any of the details of the accident and taken the statements from these people to Kelly's office, the agent's office to clarify anything that could have been a confusion of statements as they had alleged there was. I asked for a statement from Jean Halverson as I felt this would immediately clarify everything; she refused to give it to me and came up with a statement, now there is a clause of fraud in the insurance and I think I will just have that pressed or something to that effect. I advised her in just about the same tone that I had Mr. Hirst and I

(Testimony of Leo Tacke.)

advised her that I had already told Mr. Hirst, the adjuster, the same thing. [46]

Q. And that conversation was December, 1952, is that correct?

A. The latter part of December, 1952.

Q. Mr. Tacke, when did you first decide that you should have counsel of your own in representing you in this difficulty?

A. About December, 1952.

Q. And did you do anything about your decision at that time? A. Yes.

Q. And what did you do?

A. I went to another attorney and presented him the facts of the case, presented him the facts of my—

Mr. Hoffman: Might we have the name, who it was?

Q. What is the name of the attorney?

A. John Stafford.

Q. And did he take the case?

A. No, he said there wasn't enough money in it.

Q. And did you go to any other attorneys at that time? A. Yes.

Q. To whom? A. Bradford.

Q. And did he take your case?

A. He said he would write a letter to the company.

Q. Did Mr. Bradford continue representing you for [47] sometime or what were the circumstances?

A. Yes.

(Testimony of Leo Tacke.)

Q. Just briefly? A. A very short time.

Q. And did you secure the services of another attorney or attorneys following that employment?

A. Shortly thereafter I did.

Q. And who?

A. First Mr. Baillie, yourself.

Q. Yes.

A. And Mr. Angland within a few days.

Q. And you say Mr. Angland within a few days? A. As I remember it.

Q. And when was it first brought to your attention that some claims might be pressed against you as a result of this accident?

A. Right after the accident.

Q. Did any attorneys contact you in reference to pressing claims against you?

A. Yes, but that was not until December, 1953, I think December, 1952.

Q. December of 1952? A. Correct.

Q. And who contacted you at that time?

A. Mr. O. B. Kotz I think is the name. [48]

Q. And what did you do following receiving notification from Mr. Kotz that a claim or claims would be presented against you, did you report that to the insurance company?

A. I reported that to the agent, Mr. Kelly.

Q. When did you report that to Mr. Kelly? Approximately?

A. Approximately right after he contacted me which would be in December, 1952.

Mr. Hoffman: If the court please, I didn't make

(Testimony of Leo Tacke.)

the objection before but Mr. Kelly is not shown to have anything to do with the adjustment of the claims of the insurance company; he is only a writing agent, and I left the other evidence go in because I thought it would be short and not encumber the record too much, but at this time now we do object to any conversation which he might have had with Kelly, especially if he knew Mr. Hirst was the adjuster and was handling the claim and we take the position, which is the fact, that Mr. Kelly had absolutely no authority whatever at this stage of the matter.

Mr. Angland: May we be heard, your Honor?

Mr. Hoffman: May I clarify to state that is anything or authority with regards to servicing this claim or representing the insurance company in regard to any accidents; that is out of Mr. Kelly's field entirely.

Mr. Angland: Of course, your Honor is interested in where the insured might go to report a claim. Here is the [49] allegation of plaintiff's complaint: "On September 20, 1952, and at all times mentioned herein, defendant designated Bill Kelly Realty of Great Falls, Montana, as an authorized representative with power to execute a contract of insurance." That allegation of the complaint, your Honor, is admitted in paragraph (a) of defendant's answer. So Mr. Kelly most certainly is recognized as an authorized representative.

Mr. Hoffman: There is no issue on that; he was authorized to write policies of insurance or he was

(Testimony of Leo Tacke.)

solicited to write policies of insurance; there is no issue on that.

The Court: Well you know those policies, most of them have some paragraph that requires the notification either of the company or to the agent of the company, the representative of the company of any accidents or anything in connection with an accident, it seems to me. I don't know whether this policy might contain such a paragraph but they usually do have something of that sort so that the agent is to be advised of any material matter affecting the company he represents; he might not be authorized to adjust claims or anything of that sort.

Mr. Angland: I think your Honor is right. The policy says: "Conditions 1. Notice of Accident—Coverages A, B and C. When an accident occurs written notice shall be given by or on behalf of the Insured to the company or any of its authorized agents as soon as practicable." Mr. Kelly, [50] of course, is an authorized representative and the delivery of Mr. Kotz's letter to Mr. Kelly would be notification to the company under the terms of the policy. I think your Honor is correct.

Mr. Hoffman: There is no question but what when he went back there the day of the accident and reported this accident to Mr. Kelly's office that was notice to the company; we don't question that. The notice was duly given; we don't question that; but after the claim was in controversy there was a question about it and Mr. Hirst was called in as

(Testimony of Leo Tacke.)

the adjuster; he had contacted this man and we think before the company should be bound by any conversations with Kelly after that they would have to show that Kelly had authority to represent the company in reference to this matter.

Mr. Angland: It is admitted in the pleadings that he is an authorized representative and the policy says, notify authorized representative.

The Court: Well there is a point there that might be or have some issue raised over it, I suppose. We will *let* it there and cover it briefly and I will see what we can do with it later on; it is a point that might be raised.

Q. (By Mr. Baillie): I hand you Plaintiff's proposed Exhibit 11, Mr. Tacke, would you please tell the court what that is?

A. This is a letter I received from Attorney O. B. Kotz [51] Attorney, advising me that Ed Kissie and wife were pressing claims as a result of the accident.

Q. And that is addressed to you? A. It is.

Q. And what is the date of that letter?

A. December 18, 1952.

Q. And how did you receive that letter; did you receive it in the mail in the normal course of the mails? A. I believe so.

Mr. Baillie: We offer Plaintiff's Exhibit 11 in evidence.

Mr. Hoffman: We have no objection in view of the court's ruling heretofore that the court has jurisdiction; we have no objection under the objec-

(Testimony of Leo Tacke.)

tions which we have already stated in the record to the court's jurisdiction.

The Court: You offer it in evidence?

Mr. Baillie: Yes.

The Court: It may be received.

[See page 200.]

Q. (By Mr. Baillie): You testified you hired myself and Mr. Angland shortly thereafter to represent you, is that correct? A. Correct.

Q. And have we been representing you since that time continuously? A. Yes. [52]

Q. Did we represent you in the appeal of the case of Leo Tacke vs. Glenn M. Schultz?

A. Yes.

Q. Of the State Highway Department Patrol?

A. Yes.

Q. Have we represented you in all other matters pertaining to the accident and the suits which were filed against you in Cascade County since that accident? A. Yes.

Q. And we have represented you in all of the matters pertaining to this present action, is that correct? A. Correct.

Q. Mr. Tacke, have you paid your present attorneys any sum or sums for the representation in all of these matters? A. No.

Q. Mr. Tacke, do you have any knowledge, this is Plaintiff's Exhibit No. 2, do you have any knowledge of the tender of that amount? A. Yes.

Q. By Mr. Hoffman on June 11, 1954?

A. Yes.

(Testimony of Leo Tacke.)

Q. Were you contacted by your attorneys?

A. Yes.

Q. In connection with this check?

A. Yes. [53]

Q. And did you advise your attorneys in connection with this amount as to what to do with the money?

A. Yes.

Q. And what?

A. Send it back to them.

Mr. Baillie: That is all we have, your Honor.

Cross Examination

Q. (By Mr. Hoffman): I hand you now an instrument which the Clerk of the Court has designated as Defendant's Exhibit No. 12 and I will ask you to state whether or not that is your signature?

A. It is.

Q. And where did you sign that instrument?

A. I believe in the office of the Montana Claims Bureau.

Q. Yes, Mr. Hirst was present at the time and called in—in the office, wasn't he?

A. Not the first time.

Q. I say when this was signed Mr. Hirst was present when you signed this?

A. I don't know which one that is; I was there in the office twice; I don't know whether that is the first time or second time.

Q. Calling your attention to the date of the instrument [54] were you in Mr. Hirst's office? The date is on the other page, please. Is that the day that you signed it?

(Testimony of Leo Tacke.)

A. I believe it is; no recollection that it isn't.

Q. Satisfy yourself that is the day you signed it?
A. Yes.

Q. And do you recall that Mr. Hirst took your statement and had his stenographer write it up?

A. I don't believe Mr. Hirst was present; I think his stenographer took that statement if I remember correctly.

Q. And she took it in response to questions that she asked you and information that you gave her?

A. Correct.

Q. And did you look it over when you signed it?

A. Yes.

Q. And you knew what was in it? A. Yes.

Mr. Hoffman: We offer Exhibit No. 12, being a report of the automobile accident in evidence.

Mr. Angland: No objection.

The Court: It may be received in evidence.

[See page 202.]

Mr. Hoffman: Would the court care to look at it?

The Court: No, I can look at it later.

Q. (By Mr. Hoffman): Now when you talked to Mr. Hirst at the International Harvester Company you say that Mr. Hirst said, why this is a [55] case for fraud, is that correct?

A. That is correct.

Q. Now what was Mr. Hirst talking about when he said that?

A. I testified he had referred to the policy to our claim for adjustment on the policy.

(Testimony of Leo Tacke.)

Q. And that was practically all that was said, it was a case for fraud, did he say anything else to you at that time about fraud?

A. When he made that statement it made me very angry.

Q. Will you please answer the question?

A. I don't remember.

Q. And you replied to him, I consider this a bluff? A. Correct.

Q. Did you say anything else to him about the issue of fraud at that time? A. Yes, I did.

Q. What else did you say to him?

A. I said that I would welcome, as I remember that statement was also to Hirst, that I would welcome they charge me with fraud, it would immediately prove my case.

Q. Now that was in reference to your having a license to write insurance under the Yeoman Agency, wasn't it? A. Right.

Q. Do you remember how you came to discuss this license [56] to write insurance at that time?

A. He told me that I had it; he brought up the discussion as I remember it.

Q. And he claimed that it was a fraud for you to be trying to get insurance out of the Kelly Agency when you were licensed to write it in Yeoman's office, is that it?

A. All I have is his statement.

Q. I am asking you?

A. You are asking me to draw the conclusions.

Q. Well the matter came up in reference to the

(Testimony of Leo Tacke.)

discussion of your license to write insurance, didn't it?

A. Can you restate it some way so I can understand it?

Q. No, not any simpler than that. You have testified yourself that he reminded you that your license was to write insurance out of the Yeoman office? A. That is correct.

Q. And that he charged you with fraud in connection with that, with your writing insurance; I am asking you, not telling you?

A. You are forcing me to express my conclusions; I would like to express them but you will reject them.

Q. I am repeating your testimony, your testimony is that Hirst reminded you that your license was to write insurance with Yeoman Agency?

A. Correct. [57]

Q. And that you were fraudulent in that connection, now that is what I understood your testimony?

The Court: Do you understand the question?

A. Yes, I understand the question, that it means that it would be a fraud for a man working at International to buy a Chevrolet; it would be a similarity there; it isn't, not in my mind.

Q. (By Mr. Hoffman): Yes, well, very well, I am asking for the conversation.

A. That was the conversation.

Q. And we don't care for your conclusions or

(Testimony of Leo Tacke.)

what you think about it, just what you think the conversation was?

A. That was the conversation.

Q. Or restating it Mr. Hirst was objecting to your having a license to write insurance out of Yeoman's office and working at the International Harvester Company at the same time, is that it?

A. No.

Q. Well then what was it?

A. He was objecting to the idea that I showed appreciation by buying insurance from someone out of appreciation and that made me mad.

Q. Oh, so that it had nothing to do with Yeoman's office and your license to practice under Yeoman's office?

A. My buying the insurance certainly did not.

Q. I mean his charging you with fraud?

A. That was what he was charging me with fraud for because I had showed him appreciation.

Q. Now this is Mr. Hirst that you were talking to?

A. The adjuster.

Q. Now when you were talking to Jean Halverson in December, 1952, in Kelly's office, you testified that you asked her for a statement, what statement did you ask of her?

A. In regard to her conversation with Mrs. Tacke on the morning of December the 20th, 1952.

Q. What did you ask her about that conversation?

A. I simply asked her to give me a statement of that conversation.

(Testimony of Leo Tacke.)

Q. And all she gave you was a statement that there was a question of fraud involved in this matter?

A. She refused any cooperation of any kind, stating that she would continue to refuse any cooperation with me.

Q. Will you read the question?
(Question read.)

A. No.

Q. That is what I understood your testimony was on direct examination; what did she say to you?
A. The conversation was long.

Q. How long were you in the office at that time?

A. Quite some time. [59]

Q. Give the court an idea?

A. An hour or maybe two.

Q. Can you fix the day in December that that happened?

A. Yes, I can, it was I believe December the 20th, possibly the 18th.

Q. Did anybody else ever charge you with fraud in this matter besides Mr. Hirst and Mrs. Halverson, that there was a question of fraud in the case did anybody else ever charge you with fraud in this case?

A. At present I can't think of it.

Q. Now as I understand Mr. Hirst did not charge you with fraud in making this claim, his charge of fraud of course was in connection with the writing of the insurance and obtaining the policy in the first instance?

(Testimony of Leo Tacke.)

A. He charged me with fraud for asking payment on the claim as I understood it.

Q. That isn't the way I understood your testimony on direct.

Mr. Hoffman: It is about noon, if the court please. That is all the questions I believe I would have of this witness but I would like to reserve the privilege until after recess.

The Court: Very well, we will suspend here and take a recess until 1:30 this afternoon. (12:00 noon 7/28/55.) [60]

Court resumed, pursuant to recess, at 1:30 o'clock P.M., at which time the counsel and parties were present.

The Court: Proceed, gentlemen.

LEO TACKE

resumed the stand and testified as follows:

Cross Examination—(Continued)

Mr. Hoffman: May I proceed, if the court please?

The Court: Yes, proceed, Mr. Hoffman.

Q. (By Mr. Hoffman): Mr. Tacke, you are the plaintiff in this action? A. Yes, sir.

Q. Did you have a license plate for '52 on the Chevrolet involved in this accident?

Mr. Angland: Just a minute. To which we object, your Honor. I don't know the answer but I don't see that that question or the answer thereto can tend to prove or disprove any issue in this case, the license plate.

(Testimony of Leo Tacke.)

The Court: What connection has it; any materiality at all?

Mr. Hoffman: If the court please, I am about to try to prove that it was after this accident that he became interested in getting his title, getting title to his car and he didn't make application for title to the car until considerably after the accident. Probably he consulted some of his attorneys.

Mr. Angland: Your Honor, that has nothing to do with [61] the insurance, doesn't tend to prove or disprove any issues in this case as we view it.

The Court: Well if you inject that into the case that will require the other side to go on and show what the circumstances were; they were evidently in possession and I presume they can show they were entitled to possession and whether their title was proved or not would have to be a material point.

Mr. Hoffman: Our point is that there was no application made for this insurance until after the accident and that everything happens after the accident.

The Court: Well I know but what would the question of the license plates do. You want to show he was driving without a license, without any plate at all?

Mr. Hoffman: No, that he didn't make his application for title until sometime after the accident; there was no thought of insurance in his mind really until after the accident and he began to get his title and it is relevant we think on the question

(Testimony of Leo Tacke.)

of whether he possibly did apply for this insurance before the accident.

The Court: Well, of course, according to the testimony as it stands now why he talked about insurance and applied for it a long time before the accident and before the policy was ever issued to him.

Mr. Hoffman: That is true. [62]

The Court: If those statements are to be credited so what difference does that make about it?

Mr. Angland: If they are challenging, your Honor, his title to the car, as to whether he owned the car or had a right to possession of the car, and whether it was a stolen car, we will withdraw the objection; but if they admit he had a right to possession and it was in his possession at the time I don't see that the inquiry would tend to prove or disprove any issue in this case.

The Court: If you think you can connect that in a material way to possibly show that he had no thought of getting insurance until after the accident or of proving title to the car or whatever you are trying to do, if you think you have got a point there, I will let you develop it, of course, but it looks a little farfetched just now.

Mr. Hoffman: I think it has some probative value.

The Court: Go ahead, we will decide that later on after we get the whole case. You may develop that point if you think you have a point to develop.

(Testimony of Leo Tacke.)

Mr. Hoffman: Will you read the question, please?

(Question read.)

A. No.

Q. You sent in the title for transfer of the title to yourself to the Registrar of Motor Vehicles, did you not? A. I didn't understand. [63]

Q. Will you read the question, please?

(Question read.)

A. I believe so, either I or my wife, yes.

Q. And you sent that in about the 27th day of March, 1953, didn't you?

A. The date I can't fix; it was sent in as soon as I had the car back in running shape after the accident.

Q. But you dated the application for change of title December 28, 1951, did you not?

A. I don't know; I may have.

Q. Do you remember whether or not the date of the application was dated about three months before you sent the application in?

A. I don't know.

Q. And the certificate of title issued to you the last of March, did it not, 1953?

A. I don't know.

Q. Can't you remember about when you got your title? A. No.

Q. Of course I understand the car is transferred and you no longer have the certificate of title in your possession, that is correct, is it not?

A. That is correct.

(Testimony of Leo Tacke.)

Mr. Hoffman: You may take the witness. [64]

Redirect Examination

Q. Mr. Tacke, did you ever sign an application for insurance for this particular policy?

A. No.

Q. Approximately when did you actually acquire possession of this '48 Chevrolet?

A. Late in the year of '51, I think about late in December or first of January, 1952.

Q. And in what condition was that car when you acquired possession?

A. It was a total wreck; it had been wrecked and salvaged by an insurance company.

Q. And what was your purpose in buying that wrecked automobile?

A. The car, the '38 Plymouth that I was driving was old; I intended to rebuild it to make an automobile of it and rebuild it in my spare time.

Q. And you have testified your occupation is that of automobile mechanic?

A. Automobile mechanic and body man, yes.

Q. And did you actually start repairing that vehicle when you acquired possession?

A. Shortly thereafter, yes.

Q. And I believe you testified that shortly before or at [65] the time of the accident the car was repaired or what was the status at that point?

A. It was practically completed.

Q. And was your car damaged in this accident of September 20, 1952?

A. Yes, indeed.

(Testimony of Leo Tacke.)

Q. And did you repair it following that accident? A. Yes.

Q. And am I to understand that following the repairing of the car as a result of the damage in the accident of September of 1952 that you then applied for the title as you recall?

A. As I recall.

Mr. Baillie: That is all.

Recross Examination

Q. You mentioned the Plymouth that you were using, the other Plymouth, you had the two cars in 1952? A. Yes.

Q. And you had the Plymouth licensed and you were using that to go to and from work, were you not, in '52? A. Yes.

Q. And you also had it covered with insurance, didn't you? A. Yes. [66]

Mr. Hoffman: I think that is all.

Mr. Baillie: That is all.

ROBERT YEOMAN

was called as a witness by plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Angland): Will you state your name, please? A. Robert Yeoman.

Q. Where do you live, Mr. Yeoman?

A. Great Falls, Montana.

Q. And what business are you engaged in?

(Testimony of Robert Yeoman.)

A. General Insurance business.

Q. The Yeoman Agency at Great Falls is your business? A. Yes, sir.

Q. Are you acquainted with the plaintiff in this case? A. I am.

Q. And did you know him in the year 1952?

A. I did.

Q. Will you state whether or not your office issued what is referred to I believe as a solicitor's license to Mr. Tacke to sell insurance?

A. We did.

Q. And what type of insurance did you understand that [67] Mr. Tacke was to sell?

A. Hail.

Q. Hail insurance? A. Yes.

Q. And was his selling of insurance to be restricted to hail insurance?

A. Yes, at that time.

Q. Was that effective in September of 1952?

A. Frankly I haven't had a chance to look that up but I am sure it was.

Mr. Angland: You may cross examine.

Cross Examination

Q. (By Mr. Hoffman): Mr. Yeoman, did I understand your office issued the license or was it issued out of Helena?

Mr. Angland: May I interrupt you, Mr. Hoffman; I had one further question of Mr. Yeoman.

Mr. Hoffman: Yes, indeed.

Q. (By Mr. Angland): Mr. Yeoman, did Mr.

(Testimony of Robert Yeoman.)

Tacke ever sell any insurance on that solicitor's license? A. No.

Q. Never sold any insurance? [68]

A. No.

Mr. Angland: Now you may cross examine.

Q. (By Mr. Hoffman): Did you issue the license or was it issued out of Helena?

A. It is issued out of Helena.

Q. Upon your application?

A. On our application for it or his application through our office I should say.

Q. He made the application to write insurance through your office? A. That is right.

Q. And did he get a license?

A. He did get a license.

Q. Do you know where that license is?

A. I don't know where it is; we may have it in our files up there, Mr. Hoffman.

Q. Do you know whether or not it covered general insurance business?

A. No, a solicitor's license covers at least those we have cover the types of insurance written by the office that requests the license.

Q. So you are not sure at this time whether there were limitations in his license or not? [69]

A. I am sure there were no limitations as to what could be written.

Q. So that he would have been licensed to write liability and casualty insurance on automobiles out of your office?

A. If that is what we agreed to, yes.

(Testimony of Robert Yeoman.)

Q. That is he would be still subject to the contract of hire between you and him, is that what you mean to say? A. No.

Q. You say if we agreed to it?

A. What I referred to he wanted a license to solicit hail insurance; we had no understanding about any other type of insurance at all.

Q. But the license was broad enough for casualty insurance?

A. I doubt that he even knew that.

Q. I say it was broad enough?

A. It could be used for that.

Q. I think the law presumes he knew what his license was?

A. I don't think so because he was only interested in writing the hail.

Mr. Angland: Is it clear to your Honor what the situation is?

Mr. Hoffman: That is all. [70]

Redirect Examination

Q. (By Mr. Angland): In any event your understanding with Mr. Tacke at the time you secured the authorization was that Mr. Tacke would solicit hail insurance only, is that right, Mr. Yeoman?

A. If I may make a remark, our understanding with Mr. Tacke was that he has numerous relatives out in the north country——

Q. Where do you mean?

A. Out around Fort Benton and Ballantyne

(Testimony of Robert Yeoman.)

country and he thought he could write their hail insurance for them for that season.

Q. For his relatives?

A. For his relatives and friends in that vicinity, so therefore he come to our office and asked if we could get him a hail license, which we did, and that was our understanding.

Mr. Angland: I think that is clear enough, your Honor. That is all.

Mr. Hoffman: That is all.

Mr. Angland: Mr. Yeoman may be excused?

Mr. Hoffman: Yes.

The Court: Very well. [71]

Mr. Baillie: Mrs. Tacke.

LENORA A. TACKE

was called by plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Baillie): Will you state your name, please? A. Lenora A. Tacke.

Q. And your address?

A. 124 - 20th St. Southwest.

Q. And you are the wife of Leo Tacke?

A. Yes.

Q. The plaintiff in this case now pending?

A. Yes.

Q. Mrs. Tacke, are you familiar with the fact that an accident occurred on September 20, 1952?

A. September 20th, yes, I am.

(Testimony of Lenora A. Tacke.)

Q. And you are also familiar with the circumstances concerning the ordering of this insurance policy which is in question in this case?

A. Yes, I am.

Q. Did you at any time, Mrs. Tacke, ever make a written application for the policy in question with the Canadian Indemnity Company? [72]

A. No, I did not.

Q. Did you ever appear at the Bill Kelly Realty office for purposes of ordering this policy?

A. No, I did not.

Q. Did you at any time have any conversations with Bill Kelly or with representatives of his office in connection with the ordering of this insurance contract? A. Yes, three different times.

Q. And would you tell the court the approximate time of your first conversation and with whom?

A. Well it was about the 7th of September.

Q. Of what year? A. Of 1952.

Q. And to whom did you speak?

A. Well, Mr. Kelly called and wanted Leo to come up.

Mr. Hoffman: Just a minute, please. The question was, with whom did you speak?

Q. To whom did you speak at that time?

A. Mr. Kelly, Bill Kelly.

Q. And where were you at that time?

A. I was at home.

Q. And there was a telephone conversation?

A. Yes.

(Testimony of Lenora A. Tacke.)

Q. And what was the conversation at that time relative to the insurance contract? [73]

A. Well, Mr. Kelly called and wanted Leo to go up and give him an estimate on that small lawn he wanted to put in in the back of his rental property and I told Mr. Kelly at that time that Leo would go up and give him an estimate, and I said in appreciation, Mr. Kelly, for your giving us this lawn work we will take out insurance on the 1948 Chevrolet with you.

Q. And that conversation was about when?

A. Well the afternoon of about September 7th, some place in there about two weeks previous.

Q. To the accident?

A. Yes, as close as a person can tell.

Q. Was there any other conversation at that time concerning the insurance?

A. Well I called the number to the office and one of the salesmen answered.

Q. At that time or that same day?

A. No, that same day.

Q. I already asked as to the first conversation.

A. And he says, when you are ready that will be fine, is what he told me.

Q. And when was your next discussion or conversation with Mr. Kelly or his representatives of his office?

A. It was oh just a few days, possibly a week later I called in to the office in the afternoon when [74] the baby and little boy was both asleep, while it was quiet, to see if I could get hold of Mr. Kelly

(Testimony of Lenora A. Tacke.)

and one of his salesmen answered the telephone and said he was real busy and I asked him, I said I want to find out about some insurance; he said, we are real busy, you will have to talk to Bill about that and hung up, and so I left word for him to call us, at the office to be called; well I never got the call, I was never called back.

Q. And you testified there was a third conversation and with whom did you have that conversation?

A. Well Mr. Kelly called between twelve and one, on a Wednesday, about the 17th.

Q. 17th of what? A. September.

Q. What year?

A. 1952. He called because he wanted my dad. My dad had equipment, a little tractor and with this equipment they can clear weeds and do lawn work, and he wanted my dad to go up and clear the weeds and lawns and clear the rubbish off a piece of property he had for sale at about 37th some place and he said, if I can get the weeds cleared off this afternoon, I think I have a sale for it this afternoon before five o'clock. If he could get the weeds and rubbish cleared away from that property. So I assured him I would get hold of my dad and get him up there. He said, I am awfully busy and the [75] office is full of people, and I said to him, Bill, be sure Leo is covered by insurance, and he says, thank you, goodbye, and that was that conversation.

Q. Was it your intention at that time to order the insurance? A. Yes.

(Testimony of Lenora A. Tacke.)

Q. For the vehicle? A. Yes.

Mr. Hoffman: Just a minute, please. We object to her testifying to her intention or what she thought as leading.

The Court: Well was that the principal purpose of the conversation to order insurance?

A. Yes, I had been trying to get hold of him for a couple days.

The Court: Well all right we will let it stand that way.

Q. (By Mr. Baillie): And did Mr. Kelly issue that policy of insurance following that conversation?

A. We didn't get it through the mail so when I told Leo about that he said, you be sure and that Saturday morning——

Q. Do you mean——

A. We didn't receive it at that time.

Q. Did you expect that you would receive it following [76] that conversation? A. I did.

Mr. Hoffman: Just a minute. We object to her testifying what she expected, only what the conversation was.

The Court: Well, yes, perhaps.

The Court: One ordering a thing like that they usually expect a receipt of some kind in the usual ordinary course of events; I suppose that is what she was expecting to receive because she said her purpose was to order the insurance.

Q. (By Mr. Baillie): Mrs. Tacke, did you have any conversation with your husband during that

(Testimony of Lenora A. Tacke.)

time concerning the fact that you had not received the policy or concerning the policy?

Mr. Hoffman: Just a minute. To which we object—

The Court: Yes, sustain the objection.

Q. (By Mr. Baillie): Did you have any other conversations with Bill Kelly or representatives of his office concerning this particular policy or contract of insurance?

A. May I ask what you mean, that day or the rest of the week?

Q. No, any other following that conversation on Wednesday about three days prior to the accident?

A. Not on Wednesday, no. Not on a Wednesday I didn't. [77]

Q. When did you have another conversation if you did have one?

A. Early Saturday morning.

Q. What date?

A. September the 20th.

Q. Of '52?

A. Yes, Leo said to me be sure—

Mr. Hoffman: Just a minute.

Mr. Baillie: Just a minute.

A. I am sorry.

Q. (By Mr. Baillie): That particular discussion was a telephone conversation, am I correct?

A. Yes.

Q. And who initiated that telephone conversation, did you call?

A. On Wednesday morning.

(Testimony of Lenora A. Tacke.)

Q. Wednesday morning the conversation or Saturday morning you were discussing did you call?

A. Yes, Saturday I called twice.

Q. And about what time did you call?

A. The first time I called was a little before 8:30 in the morning and the line was busy and I called again before nine o'clock and our line was busy and I called the third time and got the office just a few minutes after nine. [78]

Q. And why did you, why were you placing that call, why did you make that call?

A. To see why that insurance hadn't come, to see why the policy hadn't come out in the mail yet.

Q. And you stated that you were successful in—

A. Yes.

Q. Making this call a few minutes after nine?

A. Yes.

Q. And to whom did you speak?

A. Miss Halverson.

Q. And what was that conversation relative to the insurance policy?

A. I asked her, I told her I called in to confirm that to see why we hadn't got that insurance policy that I told Kelly about.

Q. And what other conversation was there?

A. Well she said she would ask Kelly when he came in, in the meantime she would see that it was gotten right out.

Mr. Hoffman: I didn't hear that answer.

Q. Would you repeat that answer?

A. She said she would see Mr. Kelly and in the

(Testimony of Lenora A. Tacke.)

meantime she took down all the information and everything about the car.

Q. Was there any discussion concerning the type of insurance which you had ordered?

A. She asked me what kind I wanted, Miss Halverson [79] asked me what kind was wanted and I told her liability like required by the State law, ten twenty or five and ten or ten and twenty, whatever is the standard policy.

Q. Was there any other discussion as to type of policy?

A. She asked me if I wanted medical, \$500 medical.

Q. And what did you say?

A. I told her yes.

Q. Did she say anything else?

A. She said, and she says, should I date this as of yesterday and I said maybe you should being that I talked to Kelly.

Q. And at the time you made this or these telephone calls Saturday morning the day of the accident did you know at that time that an accident had occurred? A. No, I did not know.

Q. And how many children did you have, how many children did you have at that time?

Mr. Hoffman: To which we object as incompetent, irrelevant and immaterial.

The Court: Oh, well, let her answer the question.

A. I had five small ones at home and one with his dad; they are all under 12 years of age.

Q. And was there anyone else present during

(Testimony of Lenora A. Tacke.)

this telephone conversation that you had present in your home?

A. No, just the children and I; I had a new baby six [80] weeks a little boy two and the other three not at home.

Q. And when did you first find out that an accident had occurred?

A. When an unidentified lady called me later.

Q. And do you have any idea when this call came?

A. It was about 10 or 15 minutes after I had talked to Miss Halverson; it was quite a bit after 9:00 o'clock because the radio program was on "Let's Pretend".

Q. You do not know the identity of the lady who called?

A. No, she did not give her name.

Q. What did she tell you?

A. She told me that there had been an accident and she wanted to know if I had a husband named Leo, and she said there was a boy that was hurt, and that they had taken them to the hospital in the police ambulance.

Mr. Baillie: We have no further questions.

Cross Examination

Q. (By Mr. Hoffman): Mrs. Tacke, I believe you testified in your deposition that Mr. Tacke had not been using this Chevrolet car until that morning?

Mr. Angland: Now just a minute; your Honor.

Q. Is that correct? [81]

(Testimony of Lenora A. Tacke.)

Mr. Angland: Just a minute. We object to the manner that counsel is attempting to use the deposition. Certainly counsel of Mr. Hoffman's experience knows the proper way to inquire of a witness on a deposition.

The Court: Yes, he can show it to her; show her the deposition and let her examine it.

Mr. Hoffman: I will withdraw the question.

Q. (By Mr. Hoffman): Had Mr. Tacke been using this Chevrolet before the day that this accident occurred?

A. If you mean using it for purposes; no, he took it down to have the frame straightened and things in regard to repair.

Q. In other words, Mrs. Tacke, is it not true that up to the date of this accident this Chevrolet was under repair? A. That is right.

Q. And Mr. Tacke was working on it?

A. He was working on it.

Q. And that he had made no commercial or personal use of the car excepting in connection with getting it repaired? A. That is right.

Q. How did he go to and from work?

A. In the '38 Plymouth coupe.

Q. And I believe Mr. Tacke has already testified the Plymouth coupe was insured? [82]

A. I insured it with J. E. Howard.

Q. Now when you telephoned to Mrs. Halverson September the 20th, 1952, you asked her to insure this car, did you not?

(Testimony of Lenora A. Tacke.)

A. No, I asked her to confirm the ordering of that insurance on Wednesday.

Q. Did you not ask her what kind of insurance you should take on the car?

A. No, I didn't ask her; she asked me what I wanted.

Q. And what did you say when she asked you what insurance?

A. I told her what was required to protect a person in the State of Montana by that new liability law that had been just recently enacted.

Q. And what did she say in response to that?

A. She said you want ten twenty and I took it for granted that was what was required was ten twenty.

Q. You took it for granted from what she told you that that was proper? A. Yes.

Q. And did you have in mind to get collision coverage? A. You mean what, on our car?

Q. Yes. A. No.

Q. Did you have in mind to get medical coverage when you first called her up? [83]

A. Yes, I certainly did.

Q. Was it not Mrs. Halverson that suggested to you that you might just as well take out \$500 medical coverage?

A. She asked me if I wanted medical coverage.

Q. Well is it not a fact that it was Mrs. Halverson who first suggested medical coverage in that conversation?

A. That I can't remember; she was asking me

(Testimony of Lenora A. Tacke.)

the about the title, the information on a four door Chevrolet and those things.

Q. Now in all of these conversations to which you have testified did you ever mention to Mr. Kelly in any of these conversations what kind of insurance you wanted on this car?

A. I said on the insurance on the '48 Chevrolet liability.

Q. Did you tell him that you wanted liability insurance? A. That I can't remember.

Q. Did you tell him how much liability insurance or any kind of insurance you wanted?

A. That I don't remember whether I did or not.

Q. Did you tell him about how much property insurance you wanted at any time; I am talking now about the three conversations which you say you had before September 20th?

Mr. Angland: To which we object, there isn't anything in the policy to show there is any property insurance in the policy, your Honor. We object to the question as not tending to prove or disprove any issue in the case; [84] it is incompetent, irrelevant and immaterial.

Mr. Hoffman: She has property insurance, if the court wants to look at the policy, she has \$5,000 property insurance and five and ten liability.

Mr. Angland: There is a property damage and public liability; isn't that what you are talking about, Mr. Hoffman?

Mr. Hoffman: I think you know what I am talking about.

(Testimony of Lenora A. Tacke.)

Mr. Angland: Well possibly the witness does not; maybe I can guess faster than she can; public liability and property damage is all there is.

Q. (By Mr. Hoffman): And was there medical insurance ever mentioned in your conversation with Mr. Kelly?

A. I didn't have a chance he hung up; he was very busy.

Q. Well you had three conversations with Mr. Kelly you said before this?

Mr. Angland: Just a minute. We object to that as not being an accurate statement of the testimony of the witness; the witness hasn't so testified.

Mr. Hoffman: That she had three conversations with Mr. Kelly I understand before the 20th.

Mr. Angland: Your Honor, I think the record will show she had two conversations with Mr. Kelly and one with a salesman and one with Mrs. Halver-son in Mr. Kelly's office [85] and I think the record will so show.

The Court: Well the record will speak for itself when the court gets around to it. We will go on.

Mr. Hoffman: Proceed?

The Court: Yes, go ahead.

Q. (By Mr. Hoffman): You had never identified who it was that you talked with in Mr. Kelly's office that day, have you, before the 20th?

A. It was I think Tom Sterling, or I am not sure; it was one of the salesmen.

Q. That is one of the real estate salesmen?

A. One of the salesmen.

(Testimony of Lenora A. Tacke.)

Q. I am talking about Mr. Baillie's examination as to what the talks were between you and Kelly?

A. Not with Kelly and me; I didn't get a chance to tell him; I told him I want liability insurance on the 1948 Chevrolet.

Mr. Hoffman: I wish the reporter would go back and repeat that question to this witness. I want a direct answer if the court will permit it. I will repeat the question.

Q. There was no mention of limits on liability or [88] property damage or medical between you and any member of Kelly's office until September 20th, 1952, was there?

A. That I don't remember.

Q. Then you would not state on the witness stand that anything was ever said between you and anybody in Kelly's office about the limits of insurance?

Mr. Angland: Just a minute. Just a minute. We object.

Q. I mean prior to September 20th?

A. Not that I remember.

Q. Did you know that Mrs. Halverson was taking down your application for insurance while you were talking to her on the telephone?

A. She told me she was going to take down the information.

Q. And did you understand when you were telephoning to her that she was doing that?

Mr. Hoffman: Will you read the question to the witness, please?

(Testimony of Lenora A. Tacke.)

(Question read.)

A. Yes.

Q. Mrs. Halverson, I now hold in my hand——

Mr. Angland: I will object to him referring to the witness as other than Mrs. Tacke.

Mr. Hoffman: Thank you, Mr. Angland.

Q. Mrs. Tacke, I now have in my hand the instrument [89] which the Clerk of Court has marked Defendant's Exhibit 13, and I will ask you to state whether or not in the course of that conversation you came to an understanding with Mrs. Halverson that this policy was to issue as far as for bodily injury?

Mr. Angland: Just a minute. Your Honor, I am going to object to counsel propounding a question based on something I don't know whether this witness ever saw or had anything to do with or anything else, and let him show the exhibit to the witness, what part she had in preparing it.

The Court: Is her name supposed to be signed to it?

Mr. Hoffman: I want to see if this application is made in consance with her telephone conversation.

Mr. Angland: We object; she didn't make an application, and if she wrote the application or signed it, he should let her look at it at the proper time.

The Court: Mr. Hoffman, you have already questioned her with respect to the conversation and you have gone over that quite extensively, and now

(Testimony of Lenora A. Tacke.)

when you call the witness, when you call Mrs. Halverson you can show her that and ask her if that was their conversation and identify it in that way, but how can you do it with Mrs. Tacke; Mrs. Tacke doesn't know anything about that document you have in your hand and you have already asked her as to what the conversation was with Mrs. Halverson. Now why take any more time on that. [90]

Mr. Hoffman: I think that is correct too.

The Court: I think so. You bring that document up when you put Mrs. Halverson on the stand.

Q. (By Mr. Hoffman): Have you ever talked to this lady that called you on the telephone that morning and told you Leo and the little boy had been hurt in the accident?

A. She called back about 11:30 or 12:00 to see how they were, the morning of the accident; I still didn't know her name.

Q. Did you or did you not when you were talking to Mrs. Halverson on the telephone the morning of September 20th, 1952, tell Mrs. Halverson on the phone that your husband had told you to take out this insurance sometime before and that you had forgotten to attend to it?

A. I did not; the conversation was very brief.

Q. Is that the first time that you ever spoke to Mrs. Halverson about insurance? A. Yes.

Q. Now isn't it a fact, Mrs. Tacke, that on that conversation the only thing you said to Mrs. Halverson was, I want insurance?

(Testimony of Lenora A. Tacke.)

A. No, I said I wanted to confirm the ordering of that insurance.

Q. And isn't it a fact that when Mrs. Halverson called [91] you up and told you they would have to know what kind of insurance that you replied in substance, I don't care I want insurance?

A. She never called me up. I told her I wanted liability insurance. She never called me up at all.

Q. And isn't it a fact that you told her on that telephone conversation that you had tried to get Mr. Kelly the day before to order this insurance?

Mr. Angland: Now just a minute. Your Honor, we object to the repetition. The witness has said that Mrs. Halverson did not call her up and that should end the matter. If he wants to impeach the witness, he can go beyond with his witness. We object to any further inquiry as to the conversation on the ground that she has denied Mrs. Halverson ever called.

The Court: Yes, I think that would cover the ground all right, so you can bring that up from your own witness.

Mr. Hoffman: Mr. Cure has just suggested to me that I did not have the question framed right, by stating that Mrs. Halverson called you I didn't mean it that way.

Q. And I meant in this conversation with Mrs. Halverson and do you now deny that you stated to Mrs. Halverson that you were to get this insurance the Saturday before but that you were too busy and forgot to attend to it?

(Testimony of Lenora A. Tacke.)

A. I am sorry that wasn't even brought up. [92]

Mr. Hoffman: I think that is all.

Mr. Baillie: That is all.

MRS. HESTER M. DUSEK

was called by plaintiff and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Baillie): Would you state your name, please?

A. Mrs. Hester M. Dusek.

Q. And where do you reside, Mrs. Dusek?

A. I live on 14th Street Southwest on the old highway up Gore Hill.

Q. And that is in Great Falls?

A. Out of the city limits. We really don't have no address, just route one is all we go by.

Q. Do you recall anything about an automobile accident that might have occurred on September 20th, 1952 at the intersection of 14th Street and the old Helena highway road or Gore Hill road as it is sometimes called, I believe? A. I do.

Q. And is that location of that intersection near your home? A. Right on our corner.

Q. And do you know anything about that accident? [93] A. Well in just what way?

Q. Well did you see the accident?

A. No, I didn't see it when it happened.

Q. Do you know the time that that accident occurred? A. It was about 8:30.

(Testimony of Mrs. Hester M. Dusek.)

Q. And where were you when the accident occurred?

A. I was sitting on the davenport in the front room.

Q. In your own home?

A. In my own home.

Q. And did you go to the scene of the accident?

A. I did.

Q. And did you at any time or were you able to at any time identify the parties involved in the accident?

A. No, I couldn't identify them.

Q. Do you know whether that is the same accident that a Leo or Leo Tacke was involved?

A. Yes.

Q. How do you know that?

A. Because I called Bison Motors and found out that was who it was.

Q. Where did you get the information to call Bison Motors?

A. By the uniform he had on; he had Bison Motors on the back of it.

Q. You called Bison Motor Company?

A. That is right, I wanted to know if they had a man [94] late for work that morning and they said, no, I don't believe so, and I told them there was an accident on the corner and the man had a Bison uniform on, and the lady said, just a minute, and she went and said just a minute, and she went and talked to somebody and said, it must have been Leo Tacke because he used to work for them.

(Testimony of Mrs. Hester M. Dusek.)

Q. Did you know a Leo Tacke? A. No.

Q. What did you do?

A. I went back out to the car; the reason I went back I wanted to see if I could be of any help.

Q. And did you see this Leo Tacke at the scene of the accident?

A. Well he was unconscious sitting in the car for a while and then he finally got out and that is when I seen the Bison Motors on the back of his uniform.

Q. And did you at any time that morning call Mrs. Tacke concerning the accident?

A. Not until after the accident and after Mr. Tacke was on the way to the hospital.

Q. But you did make a telephone call to Mrs. Tacke? A. That is right, I did.

Q. And could you tell us approximately the time you called Mrs. Tacke?

A. Well it must have been possibly after 9:00 o'clock [95] because it seems like it takes the ambulance and police ages to get there. The little boy I had already sent to the hospital with some other people.

Q. You say after 9:00 o'clock, can you place it any better than that, any more definite?

A. No, I can't give anything more definite, between nine and nine thirty.

Q. Did you get Mrs. Tacke on the telephone?

A. I did.

Q. And what was your conversation?

A. Well I first asked her if she had been noti-

(Testimony of Mrs. Hester M. Dusek.)

fied from the hospital of any accident and a little boy getting hurt and she said, no, she hadn't. And I said, well, I wanted to find out who the boy is because Mr. Tacke told me when he got out of the car that he had his wife and little boy with him and I knew there wasn't no woman or baby in the car, and I wanted to find out who the boy was, and she said that was her son and she wanted to know what in the world happened and sort of went all to pieces and I told her nobody was hurt only the boy was cut in his right arm.

Mr. Hoffman: I do not like to object but we would like to proceed with question and answer.

The Court: Certainly.

Q. (By Mr. Bailie): Any other conversation at that time? [96]

A. She was very thankful that nobody was hurt seriously and she did say, I am very thankful and I thank God I renewed our insurance this morning and that was the end of our conversation.

Q. Did you make any other telephone calls that morning to Mrs. Tacke?

A. Not until toward noon I called, I called her again to find out how the boy was. I was interested in the boy because he seemed to be badly cut.

Mr. Bailie: That is all.

Cross Examination

Q. (By Mr. Hoffman): You say that she said to you, I thank God that I renewed my insurance today?

A. This morning.

(Testimony of Mrs. Hester M. Dusek.)

Q. This morning? A. That is right.

Mr. Hoffman: That is all.

Mr. Baillie: That is all.

W. D. HIRST

was called as a witness by plaintiff, and having been first duly sworn, testified as follows: [97]

Q. State your name, please?

A. W. D. Hirst.

Q. Do you have your records and files in this matter with you, Mr. Hirst? A. No, I don't.

Q. You received a subpoena duces tecum to bring them with you? A. I did.

Q. And you did not bring your records and files with you? A. I did not.

Mr. Angland: We ask, your Honor, that the witness be instructed to secure his records and files.

The Court: What records?

Mr. Angland: There is a subpoena duces tecum issued to him.

The Court: What about it?

A. I do not have them, your Honor. We have turned the originals over——

The Court: What is this about?

Mr. Angland: He is the insurance adjuster.

The Court: The insurance adjuster for the company?

Mr. Angland: That is right.

The Court: What records did you ask for?

Mr. Angland: "All of your records in connec-

(Testimony of W. D. Hirst.)

tion with [98] the investigation for this defendant company concerning this insurance policy." That is our request here.

The Court: Did you make any written reports of your investigation?

A. Yes, and they were sent to the company's agency here.

Q. The company's agents here?

A. In Helena, Montana.

The Court: Did you subpoena the company agents in Helena?

Mr. Angland: Possibly I can clarify it for your Honor.

The Court: If they have the records, perhaps they are not available to the adjuster.

Q. (By Mr. Angland): Mr. Hirst, your name is W. D. Hirst? A. That is right.

Q. Where do you live?

A. Condon, Montana.

Q. Condon, where is that?

A. North of Seeley Lake 35 miles.

Q. In the fall or September, 1952, where did you live? A. In Great Falls, Montana.

Q. And in what business were you engaged?

A. Attorney and insurance adjuster.

Q. Yes, you are admitted to practice law in the State of [99] Montana? A. That is right.

Q. And you are an insurance adjuster and what is the name of your insurance adjusting concern?

A. The Montana Claims Adjustment Bureau.

Q. And the Montana Claims Adjustment Bu-

(Testimony of W. D. Hirst.)

reau is an independent adjusting bureau, is that right? A. Close.

Q. That takes assignments for investigations of various insurance companies? A. Yes.

Q. Now are you telling the court that in the course of making reports for your company, the Montana Claims Adjustment Bureau, that you do not retain file copies of correspondence, letters forwarded to you by companies that you represent, in your files; that rather you dispose of the entire file and return it to the company so you have no record of your work in the matter?

Mr. Hoffman: Objected to; if the court please, he has made no such statement.

Mr. Angland: I think he has.

The Court: That is an involved question; you ought to break it up a little bit.

Q. (By Mr. Angland): Mr. Hirst, will you tell the court how you handle a [100] matter that is referred to you by an insurance company?

A. The company assigns us a loss or the agent assigns us a loss; we set up a file on it and we conduct the investigation sending all originals and so forth——

The Court: What do you mean by "we"?

A. Our office, sir.

The Court: In Helena?

A. No, our office here in Great Falls; the Montana Claims Adjustment Bureau in Great Falls conducts the investigation and sends the reports to the company or their duly authorized agent,

(Testimony of W. D. Hirst.)

keeping a copy in our file we build up, saving a copy of everything.

Q. (By Mr. Angland): Yes. Now any letters directed to you by the insurance company are kept in your file in your office here in Great Falls?

A. Up to a certain point, yes.

Q. Well you keep the letters directed to the Montana Claim Adjustment Bureau or to W. D. Hirst in your office?

A. Yes, up to a certain point.

Q. And you keep all copies of the report you submit to the company in your office?

A. Yes.

Q. Now you have said up to a certain point a couple of times, you mean that you arrive at a point that you take your [101] entire file and send it to the company? A. No.

Q. Well don't you keep a permanent record of the cases that you have investigated that your office has worked on?

A. Up to a certain point again.

Q. What do you mean up to a certain point, tell us what that means?

A. Whenever a matter, a case that is referred to us gets into litigation we take our file in our office, the Montana Claims Adjustment Bureau office and turn our complete file, keeping no records whatsoever except our little identification cards we make when the matter is assigned to us and we turn that complete file over to the company designated attorneys.

(Testimony of W. D. Hirst.)

Q. Then your entire file at this time, I won't say at the time, was turned over to the attorneys for the Canadian Indemnity Company, is that right?

A. At the time that we were instructed to turn our file over to them we did that.

Q. Yes, you turned your entire file over to them? A. That is correct.

Q. And that file has remained in the possession of the company attorneys from that time until now?

A. To my knowledge.

Mr. Hoffman: Just a minute. He may not be qualified [102] to answer that question, if he knows.

Mr. Angland: He answered it.

A. I said to my knowledge.

Q. Is the file returned to you after the case has been disposed of?

A. Sometimes yes and sometimes no.

Q. Is there a rule on it?

A. No, just a matter of keeping records and clearing the records, our office records.

Q. Sometimes in your office you retain only a card index, is that right?

A. That is correct.

Q. Well then you have brought with you the cards? A. Yes.

Q. Well that is part of your records and file, isn't it, Mr. Hirst; you are a lawyer and you have read the subpoena duces tecum?

A. That is right. We do not consider that card a part of the file.

(Testimony of W. D. Hirst.)

Q. Well what is disclosed on that card? What would we learn by looking at that card?

A. The company involved, the name of the assured, the date of the assignment, the date the file was closed and billed and our fees on it.

Q. Did it show the dates on which you worked on a case? [103]

A. No, it would show nothing but what I have stated, no dates or who did the work or nothing.

Mr. Angland: Mr. Hoffman, do you have the file that Mr. Hirst prepared in this matter?

Mr. Hoffman: We did have it. If the court please, we did have it in our office a couple years ago and I don't know whether it is in the office or not.

Mr. Angland: Mr. Hirst, when did you first inform Mr. Hoffman of the subpoena duces tecum that you now have in your hand or Mr. Cure?

A. Yesterday afternoon.

Q. Yesterday afternoon you advised them that you had this subpoena duces tecum. Mr. Hirst, do you know without referring to your file when this case was assigned by the Canadian Indemnity Company to you for investigation?

A. No, I wouldn't know exactly; it wasn't assigned by the Canadian Indemnity Company.

Q. Well whoever assigned it to you?

A. I think it was assigned as I remember the date of the accident happening was on a Saturday and it was assigned the following Monday or Tuesday.

(Testimony of W. D. Hirst.)

Q. The following Monday would be September 22nd and it was assigned to you around, either September 22 or 23, 1952?

A. Yes, something like that. [104]

Q. Did you forthwith proceed with your investigation in this matter? A. Our office did.

Q. Either you or someone under your direction?

A. Yes.

Mr. Angland: If this case should continue over tonight, we hope that it will be completed, but if the case should resume tomorrow morning, we would like at this time to ask the court to direct this witness to talk with Messrs. Hoffman and Cure for the purpose of seeking that that file is available in court tomorrow morning.

The Court: Yes, either one, who is the custodian of that file they should produce it.

Mr. Angland: Yes, it is a court process directing it be done.

The Court: And if this Helena office has it why you may subpoena them to come here and bring it. If Mr. Hoffman has had the file in his office perhaps he has got it now.

Mr. Hoffman: Well, if the court please, Mr. Hirst came over to our office last evening before closing and told me about this subpoena. We have both searched, he has searched at his office and I have searched my office and I can't find it. I do remember Mr. Hirst bringing it to me right after; when this matter was referred to our office I [105] about the day that I gave, about in July 30, 1953

(Testimony of W. D. Hirst.)

remember Mr. Hirst bringing his file over to our office and going through it. I think that we returned the file to Mr. Hirst and I think we have returned it to his office and he doesn't think we have. We have already made a fairly diligent search for it in our office and could not find the file, and Mr. Hirst tells me he was done last night and we had a conference and he told me he could not find it in his office. Now the file has been closed in this case for a——

The Court: It wouldn't be in his office anyway; he says he sent it to the Helena office and discharged himself and all he leaves in his office is cards.

Mr. Hoffman: Carbon copies. We have not said anything up to now about this peculiar demand——

Mr. Angland: There is nothing peculiar about it.

Mr. Hoffman: Just a minute, please. I have never in 35 years of practice seen a demand that a person or a lawyer turn over their entire file to the other attorney. I think Mr. Angland should designate what he wants in that file or concerning what facts he wants.

The Court: He just simply wants the papers concerning this investigation, that is all. I don't know how he could designate it any more definitely.

Mr. Hoffman: Well I have got his report of his investigation that he sent down to Mr. Dotson in Helena who is the State Agent for the defendant. I have got that [106] report here.

(Testimony of W. D. Hirst.)

Mr. Angland: Was there just one report or more than one report.

A. No more than one report.

Mr. Angland: May I interrupt just a moment, Mr. Hoffman. I think the import of the first question demonstrates very quickly, if you will look at Mr. Hoffman's letter, Plaintiff's Exhibit 1 and paragraph (d) of the defendant's answer here and the import of their file becomes very important; it is demonstrated they are attempting to excuse the conduct of the company in affirming and confirming the issuance of the policy by reason of the notice of cancellation and trying to excuse themselves for their conduct and for not having refunded the entire premium. We want to know about those things. This is the man that did the investigating and we want to know when the company knew about these things and how much they knew about them and I believe we are entitled to know that and to show it to the court.

Mr. Hoffman: I believe, if the court please, I have in my hand substantially all if not all of this man's reports to the insurance company; that has been turned over to me by Mr. Dotson of Helena, the State Agent. But I do remember and I state to the court that several years ago Mr. Hirst delivered me his personal file to go through and [107] I know there was such a file. I can't swear under oath but I can almost say I returned it to Mr. Hirst, but it was his property and there was no

(Testimony of W. D. Hirst.)

reason it was not in his office and we closed this file and it remained closed until this suit was filed. We submitted our bill for fees and everything as being closed, and I am stating to the court and I would state under oath I do not know where that file is; if Mr. Hirst doesn't have it, and I don't believe it is in our office. Now anything Mr. Angland wants to see, anything he wants to see I think he is entitled to I will be very glad to show it and if he wants to see Mr. Hirst's original report of this accident, I will let him see it but I don't think Mr. Angland has the right.

Mr. *Hoffman*: I have a right to issue a subpoena duces tecum to a man who investigated the accident as this man did.

The Court: Part of the file was of Mr. Hoffman as attorney and the investigation of the adjuster is a different proposition? Have you shown this file to Mr. Angland, the report of the adjuster here, that is what he wants.

Mr. Angland: Yes, he has one report. The adjuster I think said he made several.

The Court: Suppose you look at that report and see if that is what you want.

Mr. Angland: I don't like to hold up the trial at [108] the moment, but I will be glad to do that, to look at the report you have and see if that will answer what I have in mind.

The Court: Have you communicated with the agency in Helena?

(Testimony of W. D. Hirst.)

Mr. Hoffman: We communicated with the defendant insurance company; it is the original report from him to the insurance company.

Mr. Angland: If I may have a moment, your Honor, I will look this report over and see if it will cover what we have in mind.

The Court: Very well, look it over.

Mr. Angland: This report is referred to as preliminary report and it refers to an early advance report so we only have here a preliminary report that follows an advance report that had been given and apparently a final report was given.

A. It is not there?

Mr. Angland: Mr. Hoffman has not showed it to us.

Mr. Hoffman: We have already introduced the preliminary report out of Mr. Hirst's office.

Mr. Angland: That is the accident report referred to in here, that is referred to as enclosure in this report; Mr. Hirst refers to that as an enclosure with this letter, and then he refers to this report as a preliminary report. [109]

Mr. Hoffman: Very well, there is the file; he may go through it and see Mr. Hirst's letters; I have no objection.

The Court: Well you better take some time and go through it and if that record isn't any good to you, you will have to find out where the other report is, if there is any other report because so far as the testimony goes here neither the attorney

(Testimony of W. D. Hirst.)

nor the adjuster know what has become of that report; they haven't got it they say. Well we can't require the impossible, you know. It is up to you to discover, if you can; it seems to me the only source there is available now for inquiry at any rate would be the Helena agency and see if it got back to their possession. I don't know what else we can do about it, do you?

Mr. Hoffman: That is about all.

Mr. Angland: No, I don't, your Honor.

A. (Witness) Your Honor, if I may make a suggestion, the advance report is in that file that Mr. Angland is examining.

The Court: That he is inquiring of?

A. Yes.

Mr. Angland: Is your final report in there?

A. The final report I think is there too. I wouldn't know without examining it.

Mr. Angland: I don't like to take the time of the [110] court now in looking at these things.

The Court: In the meantime when we take a recess you can read that and see.

A. This is the final report.

The Court: And finish with your examining and let's get moving.

Mr. Angland: Let's excuse this witness for a moment, your Honor, and we will proceed and call him after the recess.

The Court: Call your next witness.

Mr. Angland: Mr. Baillie.

WILLIAM L. BAILLIE

was called as a witness, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Angland): Will you state your name, please? A. William L. Baillie.

Q. And you are an Attorney at Law practicing in Great Falls, Montana?

A. That is correct.

Q. And you are one of counsel for plaintiff in this case? A. That is correct. [111]

Q. Mr. Baillie, for how long a period of time have you been representing the plaintiff, Mr. Tacke, in matters arising out of the issuance by the Canadian Indemnity Company of the insurance policy referred to as policy No. 22 CA 3908?

A. It would be slightly under three years.

Q. Now state to the court briefly what work you have done in connection with the case?

A. Starting early in the spring of 1953 I had many discussions with Mr. Tacke, also with Mrs. Tacke, concerning the case, concerning the facts of the accident. I had many discussions with Attorney Kotz who was at that time presenting a claim.

Following that in the early spring there was the order of suspension of the driver's license. I spent considerable time at that point in briefing the law in handling and in helping to handle the case where we appealed the order of suspension of Mr. Schultz, Supervisor of the Highway Patrol.

(Testimony of William L. Baillie.)

Following that decision of Judge Speer in 1953 there were some discussions with James and Scott, Attorneys, Ted James of that firm, concerning his representation of the claimants. There was considerable briefing of the law following a fairly extensive investigation checking the scene of the accident, checking with several witnesses, police investigations and so forth. [112]

Following that there was, as I state, considerable briefing of the law concerning the best approach to the matter insofar as handling the case for Mr. and Mrs. Tacke.

Then in the spring of 1954 two lawsuits were filed against Mr. Tacke. There was discussions and certain decisions to be made at that time concerning the correct way to handle things in view of the denial of any coverage of that at that time by the Canadian Indemnity Company.

And following that the bringing of this case, considerable research concerning the proper approach and proper method of bringing this matter to a court's attention for the Tackes, various conferences and many conferences with Mr. and Mrs. Tacke concerning the matter, preparation of the pleadings in this case and considerable research into the law.

Q. And briefing of the motion of the defendant to strike in this case and research in the law preparatory to the trial of this matter, is that right? A. That is correct.

(Testimony of William L. Baillie.)

Q. Now in most of that work I have joined with you, I think?

A. That is correct; in most of that work we were working together, that is correct; various conferences, I might say with you.

Q. Mr. Baillie, you are associated in the practice of [113] law with the firm of Jardine, Stephenson, Weaver and Blewett of this city?

A. That is correct.

Q. And for how many years have you been associated with that firm?

A. Between 6 and 7 years.

Q. And you by reason of discussions with members of that firm, Mr. Art Jardine, Mr. John Stephenson, Mr. Alex Blewett and Mr. John Weaver, and other members of the firm, and Mr. Chase, who used to be there, do you believe that you are in a position to fairly advise the court as to what a reasonable attorneys' fee to be allowed to counsel for the plaintiff in this case would be?

A. Well actually in the case I have not kept an up-to-date hourly record of time spent but I would say offhand for the actual time and in briefing law and discussions and investigations that certainly a fee of \$1500 or even \$2,000 would not be excessive.

Q. For each of us you mean?

A. For myself for the work I feel I have put in on the case.

Q. Yes, and we have asked for \$3,000 in this case?

A. That is correct.

Q. And half of that would be a very conserva-

(Testimony of William L. Baillie.)

tive allowance of a fee to you? [114] A. Yes.

Mr. Angland: Mr. Hoffman, have you with you the letter directed to the Canadian Indemnity Company under date of October 30, 1953, in accordance with notice to produce?

Mr. Hoffman: I have never seen that letter. I have not had it and never had it in my possession.

Q. (By Mr. Angland): Mr. Baillie, will you look, please, at what has been identified as Plaintiff's Exhibit 14 and state whether or not you know what that is?

A. That is a letter dated October 30, 1953, addressed to the Canadian Indemnity Company signed by myself and also by you in our representation of Mr. Tacke. Actually the letter was sent to the Canadian Indemnity Company in behalf of Leo Tacke in connection with this accident of September 20th, 1952, and advising them of the order of Judge Speer setting aside the order of suspension.

Mr. Hoffman: Now just a minute, the letter itself would be the best evidence.

Mr. Angland: Very well.

Q. Plaintiff's Exhibit 14 is a copy, a carbon copy? A. It is a carbon copy, yes.

Q. I notice the copy has both names, William L. Baillie and Emmett C. Angland, do you recall which one of us signed [115] that letter?

A. I don't recall which of us signed it.

Q. I don't recall. We collaborated in preparing it? A. That is correct.

Mr. Hoffman: Mr. Dotson is in court; may I

(Testimony of William L. Baillie.)

show it to him and see if he received the letter; if he did, I will admit it.

Mr. Hoffman: He has the original of that letter, if the court please, and we would just as soon give Mr. Angland his carbon copy.

Mr. Angland: We would rather have the original. We did serve a notice to produce on Mr. Hoffman; if they have it in court, we want the original one.

The Court: Well, all right, have you got it?

Mr. Hoffman: Mr. Dotson, did you remove it from the file. I had never seen that letter, if the court please, but I did know there was some such letter. It was not in Cascade County when the subpoena was served on me.

Q. (By Mr. Angland): Mr. Baillie, do you recall the response from the Canadian Indemnity Company to the letter dated October 30, 1953, do you recall that? A. Yes, I believe I do.

Q. I am directing your attention to Plaintiff's Exhibit No. 15— [116]

Mr. Hoffman: Mr. Angland, would you mind letting me have your carbon copy?

Mr. Angland: That is the reason I asked for the original.

Mr. Angland: That is the only carbon copy I have, Mr. Hoffman.

Mr. Hoffman: Very well.

Q. (By Mr. Angland): Proceed.

A. Yes, this is the letter dated November 2nd, 1953. It is addressed to Emmett C. Angland from

(Testimony of William L. Baillie.)

Canadian Indemnity Company, United States head office Los Angeles, California, acknowledging receipt of our letter of October 30th and stating the matter had been referred to the general agent in the state of Montana, Mr. Dotson, and also stating Mr. Hoffman of Great Falls is the attorney representing this matter and directing that we contact Mr. Hoffman.

Q. And directed us to contact Mr. Hoffman?

A. Yes.

Mr. Angland: Now at this time we offer in evidence Plaintiff's Exhibit No. 14.

Mr. Hoffman: No objection.

Mr. Angland: Would your Honor care to look at that letter at this time or not?

The Court: Not now; I will have to read it all later on. [117]

[See page 207]

Mr. Angland: That is all, you may cross examine.

Cross Examination

Q. (By Mr. Hoffman): I believe you said you were associated with Jardine, Stephenson, Blewett and Weaver?

A. That I was associated with that firm, yes.

Q. With that firm? A. That is correct.

Q. And you usually work in connection with work in that office? A. That is correct.

Q. You may state to the court now whether or not that firm is interested in this lawsuit?

Mr. Angland: Just a minute. To which we ob-

(Testimony of William L. Baillie.)

ject, your Honor. The records and files in the case speak for themselves. The complaint is filed by the counsel of record in the case. We object to the form of the question and it does not tend to prove or disprove any issue in this case.

The Court: Yes, I don't think so. He is acting here as an independent attorney apparently.

Mr. Hoffman: That is what I wanted to bring out, that firm is not interested in this suit at all.

Q. (By Mr. Hoffman): Now these discussions you had with Messrs. James and Scott in connection with the suits that they filed do you have an express understanding with them that they will not enter the default in those cases as has been testified in this case?

A. I believe Mr. Angland would be in better position to testify concerning that since he handled that portion of the negotiations with them.

Q. You just testified you had been having discussions with James and Scott in connection with those matters?

A. I discussed, I had several discussions with James and Scott concerning the matters concerning the individual suits. Mr. Angland is in better position to testify but I can answer that. I believe it is my understanding and Mr. James has indicated he would not take a default, an understanding with Mr. Angland and myself pending any outcome of the issue which is present.

Q. And did you have that understanding with them before or after they filed their suit?

(Testimony of William L. Baillie.)

A. We got the understanding then following the filing of our suit; we did not know they were going to file suit.

Q. Before they filed the suit the matter had been in Mr. Kotz' office?

A. That is correct. [119]

When the suit was filed I personally did not know that James and Scott had taken it over.

Q. Did you personally have anything to do with the suggestion the default be not entered and leave it in status quo?

A. Well I don't know that there was a suggestion that that be done.

Q. I am asking you if you made that suggestion? A. I made no suggestion.

Q. Do you know whether Mr. Angland did?

A. I don't know.

Mr. Hoffman: That is all.

Mr. Angland: That is all.

The Court: Did you introduce all those letters?

Mr. Angland: I didn't offer the other letters, your Honor. I might at this time if I may be permitted.

The Court: I was wondering if you intended to.

Mr. Angland: I will offer it.

Mr. Hoffman: The letter October 30, 1953, that is admitted?

Mr. Angland: The record shows that is in, Exhibit 14. Now Exhibit 15 I will offer at this time.

Mr. Hoffman: We have no objection.

The Court: What is the exhibit number?

(Testimony of William L. Baillie.)

Mr. Angland: Plaintiff's Exhibit 15, your Honor.

The Court: It may be received in evidence.

[See page 210]

Mr. Angland: It is in response to Exhibit 14.

Mr. Angland: I presume I had better take the stand for a moment.

EMMETT C. ANGLAND

having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Baillie): State your name?

A. Emmett C. Angland.

Q. Your occupation? A. I am an attorney.

Q. And you are associated with myself in this case, Leo Tacke vs. Canadian Indemnity Company?

A. I am.

Q. And how long have you been representing in conjunction with myself Mr. Tacke in connection with the matter, in the matters under the Canadian Indemnity Company insurance policy.

A. I entered the matter and began representing Mr. Tacke with this about shortly after the issuance of the order of suspension by the Montana Highway Patrol and I believe that was issued in April of 1954, wasn't it, or 1953? May I look at the exhibit your Honor.

Q. I believe the exhibit will show that was 1953.

A. '53 is right.

Q. And you have been working and representing Mr. Tacke in this capacity since that time?

(Testimony of Emmett C. Angland.)

A. I have.

Q. And would you indicate approximately the type and amount of work that you have done for Mr. Tacke in this connection?

A. My testimony in that regard would be substantially the same as the testimony of the previous witness, Mr. Baillie. It has involved all of the matters to which he has referred and we have worked together on all of the matters connected with attempting to secure what we believe to be Mr. Tacke's rights under the contract of insurance.

Q. In that regard, Mr. Angland, in the complaint we have asked for the reasonable value of certain attorneys fees and indicated that reasonable value would be \$3,000, in your opinion is that a reasonable charge?

A. I think it is a very conservative charge by reason of my experience in the practice for some 18 years I believe it is.

Q. Mr. Angland, have you paid any of the expenses in connection with the various suits filed and matters handled?

A. I believe that I have expended, possibly your office or you have paid some of the costs, but I believe that I have paid most of the costs, and I am reasonably certain that [122] Mr. and Mrs. Tacke have been unable to pay and we might say they have a large family; we haven't asked them to pay any of the costs up to this time, nor have we requested any fee of them.

(Testimony of Emmett C. Angland.)

Q. Do you have any idea of the approximate costs?

A. You have my office sheets there. I slipped them into the file.

Q. Do you identify these two pages which I am handing you?

A. Hand me my glasses too, Mr. Baillie, please. The cost sheet has to do with the case of Tacke vs. Glenn M. Schultz, Supervisor, Montana Highway Patrol. In that I have entries of the various documents and showing expenditure of \$17.10. In the case of Leo Tacke vs. Canadian Indemnity Company, being the instant case——

Mr. Hoffman: If the court please, may it be understood we are objecting to this line of testimony as not a proper charge against the Canadian Indemnity Company?

The Court: Yes; it may be received subject to your objection.

A. There was expended in that matter filing fee of the District Court, service of summons paid the United States Marshall, \$17.00 in all, and payment for the depositions of Mr. and Mrs. Tacke to R. L. Robertson in the sum of \$17.10. I believe those were the expenditures in cash that I have [123] in their behalf.

Q. Since the filing of the complaint of Leo Tacke vs. Canadian Indemnity Company have you done considerable or have you done very much work in the case?

A. Since the filing of the complaint in this case?

(Testimony of Emmett C. Angland.)

Q. Yes.

A. I should say, well, preparatory to filing the case or since it was filed?

Q. Following the preparation and filing of that complaint?

A. Well there was considerable work involved, legal research to determine the nature of the case that should be filed, the type of proceedings to take against this company, and since the filing of the complaint the defendant filed a motion to dismiss. We were required to brief, prepare two briefs in that matter, one an opening brief and the case was submitted to the court under the rule permitting submission of motion on briefs. We filed an opening brief and reply brief and we have done considerable research in the law preparatory to the trial of the case here.

Mr. Baillie: I have no further questions.

Mr. Angland: Do you have any questions, Mr. Hoffman?

Mr. Hoffman: None.

Mr. Angland: The only other witness we believe we have is Mr. Hirst.

Mr. Hoffman: We have that other report. [124]

Mr. Angland: If we can have a short recess, we can look it over. We don't have the complete file as we want it, your Honor.

The Court: Very well, we will take a ten minute recess and give you an opportunity to examine that report and see if it is what you want. (3:30 P.M.)

Court resumed, pursuant to recess, at 3:45 P.M.

at which time all parties and counsel were present.

The Court: Proceed.

Mr. Angland: Mr. Hirst, would you take the stand?

W. D. HIRST

resumed the stand and testified as follows:

Direct Examination—(Continued)

The Court: Did the plaintiff rest?

Mr. Angland: We just have one or two questions of Mr. Hirst.

The Court: You are recalling Mr. Hirst.

Mr. Angland: Yes, your Honor.

Q. (By Mr. Angland): You are the same W. D. Hirst that was on the stand a few minutes ago?

A. Yes.

Q. Mr. Hirst, directing your attention to Defendant's [125] Exhibit No. 12, being the report of the automobile accident, it is noted that the driver of the other car is identified as Ed Zeen, did you determine in the course of your investigation that the name was not properly identified and that was actually Ed Kissee?

A. Our office in developing the investigation determined this was the wrong name.

Q. It developed that was a wrong name?

A. That is correct.

Q. And you directed the Canadian Indemnity Company to correct their records accordingly?

A. We notified them of the error.

Mr. Angland: That is all.

Mr. Hoffman: That is all.

Mr. Angland: Plaintiff rests, your Honor. [126]

GERTRUDE SCOTT

was called as a witness by defendant, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hoffman): You may state your name, please? A. Gertrude Scott.

Q. And what is your present official position?

A. Records Clerk.

Q. In what office? A. City Police.

Q. Of the City of Great Falls, Cascade County, Montana? A. That is correct.

Q. And do you have with you an instrument which I have requested for you to bring with you to court? A. Yes, I have.

Q. Will you produce it, please?

A. I have the copy and the original.

Q. Handing you Defendant's proposed Exhibit No. 16, just now identified by the Clerk of the Court, will you state to the court whether this is a part of the records in your office?

A. Yes, it is.

Q. And did you produce it in court at our request? A. Yes. [127]

Q. And are you acquainted with a Mr. Swingley? A. Yes, Officer Swingley.

Q. And do you know his handwriting?

A. Yes.

Q. And that is his signature?

(Testimony of Gertrude Scott.)

A. That is his signature.

Mr. Hoffman: I believe we should step aside and I should put Mr. Swingley on for further proof of the document.

Mr. Angland: What is the exhibit number, Defendant's Exhibit 16, Mr. Hoffman.

LEROY SWINGLEY

was called as a witness by defendant and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Hoffman): Mr. Swingley, you may state your name, please.

A. LeRoy Swingley.

Q. And what is your official position?

A. Right now Police Department.

Q. You are a policeman in the Great Falls Police Force, are you not?

A. That is right.

Q. And were you such in the month of September, 1952? A. Yes. [128]

Q. Particularly on the 20th day of September, 1952? A. That is right.

Q. And what position were you occupying on the 20th day of September, 1952?

A. I was desk officer and ambulance driver.

Q. I will show you Defendant's proposed Exhibit No. 16 and ask you to state whether or not that is your signature?

A. This is my signature here on the reverse side.

(Testimony of LeRoy Swingley.)

Q. On the reverse side? A. Yes.

Q. And is this a report in your own handwriting? A. It is.

Q. And you may state to the court whether the matters portrayed in this exhibit are a full, true and correct portrayal of the facts they purport to portray? A. They are.

Q. And can you state of your own personal knowledge about when this report came in here?

A. The report was received at 8:24 a.m. on September 20, 1952.

Q. And that is the report of this Tacke accident? A. That is right.

Mr. Hoffman: Any cross examination?

The Court: Have you shown that to counsel?

Mr. Hoffman: I was going to offer it a little [129] later after she states it has been in her custody all this time.

Mr. Angland: If you want to introduce that, we have no objection.

Mr. Hoffman: And we will offer further foundation and we offer it in evidence, if the court please.

The Court: Yes, all right.

The Court: What time did he fix, 8:24 a.m. was it?

A. Yes, 8:24 a.m.

Mr. Hoffman: Call from a lady at 8:24 o'clock a.m.

The Court: All right, it may be received in evidence. That is an original document, you may want to send that back to the office.

(Testimony of LeRoy Swingley.)

Mr. Hoffman: We will attend to that right now. Do you want to examine Mr. Swingley?

Mr. Angland: We have no cross examination.

Mr. Hoffman: May Mr. Swingley be excused?

Mr. Baillie: Yes.

Mr. Hoffman: Will you take the stand again, please.

GERTRUDE SCOTT

resumed the stand and testified as follows:

Direct Examination—(Continued)

Q. (By Mr. Hoffman): I am handing you an instrument and I will ask you [130] to state whether or not you prepared this instrument?

A. Yes, I did.

Q. And is that a full, true and correct copy of the Defendant's Exhibit No. 16 just introduced in evidence? A. Yes, it is.

Mr. Hoffman: We are doing this for the purpose of letting her take it back and keep her files.

Mr. Angland: If you want to substitute a copy and it is an accurate copy we have no objection to the substitution, your Honor.

The Court: Very well, it may be substituted for the original.

[See page 211.]

Mr. Hoffman: And may the order further show she is permitted to take this original back to her office?

The Court: Yes.

Mr. Hoffman: You may cross examine the witness.

Mr. Angland: No cross examination.

Mr. Hoffman: May this witness be excused, please?

Mr. Angland: We have no objection.

CLARENCE FISHER

called as a witness by defendant and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Hoffman): You may state your name, please. A. Clarence Fisher.

Q. What is your present position?

A. Policeman.

Q. And were you a policeman in September, 1952? A. Yes, I was.

Q. And that is on the City Police Force of the City of Great Falls, is it? A. Yes, it is.

Q. And I notice if you will look at this copy which has been substituted for the original record your name is on it? A. Yes.

Q. Do you recall that accident?

A. Well only the call is all.

Q. You remember the call?

A. I was at the desk.

Q. And can you state of your personal knowledge whether or not this call actually came in at 8:24? A. 8:24 is the call time.

Q. I believe you worked on this accident that day?

A. I worked the desk; I answered the phone when the call came in.

Mr. Hoffman: You take the witness.

Mr. Angland: No cross examination. [132]

Mr. Hoffman: May this witness be excused, please?

The Court: Yes.

JANE HALVERSON

was called as a witness by plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hoffman): You may state your name, please. A. Jane Halverson.

Q. Are you the Jane Halverson that's been mentioned through the testimony as being employed in the Kelly Real Estate and Insurance office in the month of September, 1953? A. Yes.

Q. Of 1952? A. Yes.

Q. And you may state to the court about what time you came to work on September 20th, 1952?

A. About 9:00 o'clock.

Q. Do you have a fixed time for arrival at your office?

A. We should be in the office at 9:00 o'clock.

Q. And is that the time that you actually arrived at your office that morning? A. Yes.

Q. And you may state whether or not in the course of that [133] forenoon you had a conversation with Mrs. Lenora Tacke?

A. Yes, about 9:30. I believe it is on the application.

Q. And you may state to the court please exactly what the conversation between you and Mrs. Tacke was on the telephone that morning?

(Testimony of Jane Halverson.)

A. Well Mrs. Tacke called and she said she wanted some insurance and she said she wanted it dated yesterday because she had tried to call us yesterday and I said, well, have you had an accident, and she said, no. So I didn't argue with her about it.

Q. Please testify to the court and not to me.

A. I just dated it the day that she called and tried to explain the policy coverage. I said, what kind of coverage do you want? She said, just standard coverage. I tried to explain liability, property damage and collision coverage to her and she was in such a hurry she just wanted insurance and I said, well, we will write, ten, twenty and five and five hundred medical, how is that? She said, that is fine, you can put it in the mail.

Q. Did you quote the rates on different kinds of insurance to her?

A. She just didn't have time to listen to me any more about it.

Q. About how long were you on the telephone with her?

A. Oh, just a very short time, just a few minutes. [134]

Q. And you may state whether or not during the course of the conversation you made a record of the conversation with her?

A. Well as I take an application for a policy when somebody gives a policy order for insurance we write it on the application the type insurance they want, the vehicle that is covered and the time

(Testimony of Jane Halverson.)

that the call came in and then we write the policy from the application.

Q. Handing you Defendant's Exhibit No. 13 you may state whether or not that is in your own handwriting except for the printed parts? A. Yes.

Q. When did you make those notations?

A. Right while she called me, when she was talking to me.

Q. That was made in the course of the telephone conversation, was it? A. Yes.

Q. And was that the usual course in your office when insurance is ordered to take a record of the application in this fashion? A. Yes, always.

Q. And calling your attention to the note the call was at 9:30 a.m. are you certain in your recollection this morning that that is the time this telephone call came it?

A. Yes, I put it down when she called. [135]

Mr. Hoffman: We offer Defendant's Exhibit 13 in evidence.

Mr. Angland: May I inquire of the witness, Mr. Hoffman?

Mr. Hoffman: Yes.

Q. (By Mr. Angland): I take it you can write shorthand, Mrs. Halverson, will you please read that for us?

A. Well to tell you the truth I can't "body man" it looks like "mechanic and body man," but I don't know what the abbreviated longhand would be; the shorthand I can read but not the longhand.

(Testimony of Jane Halverson.)

Q. Now I used to do a little shorthand myself and I can't—it looks like “mano”?

A. This part is “body man”.

Q. The “s” on there must have another meaning, isn't that right? Mrs. Tacke never saw this?

A. No.

Q. Defendant's Exhibit 13?

A. She would have no way to see that.

Q. And Mr. Tacke never saw it? A. No.

Q. And neither of them were ever asked by you or anyone in your office so far as you know of in the Bill Kelly Realty office to sign this instrument?

A. We never asked them to sign the instrument.

Mr. Angland: We object to the introduction of the exhibit identified as Defendant's Exhibit 13, your Honor, on the ground and for the reason that it is incompetent, irrelevant and immaterial, an attempt to bind the plaintiff in this case by a document with which he was not concerned and had no control over making and didn't know it was made or anything about it.

The Court: Well, of course, there is another feature to be considered here in connection with that, that is a personal memorandum she made at the time in order to fix the facts and the time in her mind and without that memorandum she wouldn't be able to fix that time. If she was permitted to use something she wrote herself at the time, it would be admissible on that ground now.

Mr. Angland: Yes, your Honor, we agree with

(Testimony of Jane Halverson.)

that but not as an application, not as an application.

The Court: Well this is a memorandum she made.

Mr. Angland: As a memorandum.

The Court: She used it to bolster her memory of the exact time and place and date.

A. We bind coverage by those applications. Sometimes the policy is not written for a day or so even and we don't have time to do everything as it comes in so when the information is put on that form they are covered right at the—[137]

Mr. Hoffman: The plaintiff's case, if the court please, rests—

The Court: What is that?

Mr. Hoffman: The plaintiff's case rests pretty largely on what Mrs. Tacke as his agent has done.

Mr. Angland: Not at all. That isn't it, Mr. Hoffman.

Q. (By the Court): Well is it customary for customers to call you on the phone and ask for issuance of a policy?

A. Yes.

Q. And you carry on a conversation as to the kind of policy and amount of liability and so forth and so on and you make out this sheet as you go along?

A. Yes.

Q. And make up a policy for them?

A. Usually people are interested in what kind of coverage and how much it will cost; they just

(Testimony of Jane Halverson.)

don't want the insurance right now and no interest in what kind or how much or how much it will cost.

The Court: Very well.

Mr. Angland: Your Honor, we have no objection to the admission of that document as a memo she had in her office and kept in the usual course of the business but we do object to it as an application. [138]

The Court: I will admit it on that ground, that it is a personal memorandum that she made. Any further examination?

[See page [205]

Mr. Hoffman: Yes, there is, if the court please.

Q. (By Mr. Hoffman): Did Mrs. Tacke at that time make any statement to you about that she had tried to call Mr. Kelly the day before?

A. She didn't say Mr. Kelly or anyone in particular. She said, I tried to call you, she said, I tried to call your office the day before and she said that was the reason she wanted the insurance dated that date.

Q. Did she say anything to you at that time about Mr. Kelly having told her to get the insurance before he forgot about it? A. No.

Q. Did you hear Mrs. Tacke in this case?

A. Yes.

Q. Now in reference to her testimony that she asked you on the telephone that morning why Mr. Tacke's policy had not come through, did she make any such request of you that morning on the telephone? A. No.

(Testimony of Jane Halverson.)

Q. She says that when she asked you why the policy had not come through you told her that you would see Mr. Kelly about that, did you have any such conversation with her that morning? [139]

Mr. Angland: Just a minute. Your Honor, we ask that counsel not lead this witness, that he ask her questions without leading her; he is leading and suggestive in his questions.

The Court: Yes.

Mr. Hoffman: I am quoting her testimony, if the court please, and asking if that took place.

The Court: I think you can do that. I don't know how you could go about it if you didn't ask directly if the testimony is worded precisely.

Q. (By Mr. Hoffman): Did she at that time on that telephone conversation request you to date the policy a day before? A. Yes.

Q. And what did you say to that?

A. I said, have you had an accident?

Q. And what did she say?

A. She said no.

Q. When did Mr. Kelly appear on the scene that day if at all?

A. Well when, after he came to work which was, must have been close to ten I laid the application on his desk and told him of the details that the woman was a little fluttered, that she wanted to date the policy the day before and I said, well, what do you think about it, do you think [140] I should write it? And he said, well, all right. And I said, do you think they had an accident? He said,

(Testimony of Jane Halverson.)

of course, not, they wouldn't do a thing like that. So I wrote the policy.

Q. So you proceeded to write the policy under those conditions to Mr. Kelly's directions?

A. Yes, sir.

Q. Did Mr. Tacke call in that forenoon and report this accident?

A. No, I believe Mr. Tacke came into the office just before noon sometime.

Q. Just before noon?

A. Yes, and he reported the accident that it happened about 9:30.

Q. And did you have the policy issued at that time?

A. Yes, the policy had been written.

Q. Issued and signed? A. Yes.

Q. What did you do with the policy after you issued it?

A. I mailed it; I mailed it on my way home at noon.

Q. And where did you deposit it in the mail box?

A. In the box on the corner of Central and 6th Street.

Q. The corner of Central and Sixth Street in the mail box on the corner of the street you deposited it? A. Yes. [141]

Q. And did anybody request you to mail the policy to them?

A. Yes, Mrs. Tacke had requested we mail it. She said she would send in the motor and serial

(Testimony of Jane Halverson.)

number later but that she wanted the policy right away.

Mr. Hoffman: You may take the witness.

Cross Examination

Q. (By Mr. Angland): Mrs. Halverson, I think you said a few minutes ago that it is quite common to have these memorandum made up such as Defendant's Exhibit 13 and sometimes you issue the policy a few days later depending on when you get to it, is that right? A. Yes.

Q. You are not with Mr. Kelly now in that office? A. No.

Q. But that was the custom while you were there in the year 1952, wasn't it? A. Yes.

Q. Did you keep these slips on your desks so that you would have them available to write whenever you got a phone call of that nature?

A. Yes. [142]

Q. Did Mr. Kelly keep one of those on his desk?

A. Yes.

Q. And when he had one of those calls what did he do with it, do you know, did he hand it to you or type out the policy?

A. No, he sent it to me and I would type the policy.

Q. He would hand it to you?

A. Or he would tell me and I would put it down on the application.

Q. Oh, I see, Mr. Kelly didn't write up this type memorandum, he would give you the informa-

(Testimony of Jane Halverson.)

tion; after he received a request for insurance he would give you the information and you would put it on one of these memo sheets?

A. If I was handy he would give me the information; if not, he would put it on himself.

Q. He would put it on one of these himself?

A. Yes.

Q. After you learned that some difficulty and question had arisen concerning this particular insurance policy controversy here did you make a search of your office to determine whether or not there was any memo that might have been made by Mr. Kelly when he talked with Mrs. Tacke on September 17th, 1952?

A. I didn't make a search of the office, but—

Q. That is adequate, you have answered. [143]

A. But then again later Mrs. Tacke called and mentioned that and then I asked Mr. Kelly, I said, did she say anything to you previous to this on the telephone and Mr. Kelly said, no, if she had asked me or Leo had asked me for insurance, it would have rung a bell because I was under the impression he was licensed to write for Yeoman.

Q. In any event you didn't make a search of the office to find out if there was any memo on that matter on December 19th?

A. You don't have to make a search of the office; there is one basket.

Q. Well we all of course like to run an efficient office but sometimes we don't get things in the right basket, isn't that true, Mrs. Halverson, you have

(Testimony of Jane Halverson.)

office experience and you don't always get things in the right basket?

A. I don't find any trouble keeping it in the right basket.

Q. You don't? A. No.

Q. Well, you are a fortunate girl. And now when Mr. Tacke reported this accident shortly before noon on September 20th, 1952, did he report it to you or to Mr. Kelly? A. To me.

Q. To you? A. Yes. [144]

Q. Was Mr. Kelly present?

A. I don't remember.

Q. You don't know whether Mr. Kelly was in the office or not? A. No.

Q. And I suppose thereafter your office referred the matter to Mr. Hirst is the situation?

A. I tried to call Mr. Hirst's office and it was closed.

Q. That day?

A. Yes, so that must have been afternoon because I believe they leave at noon on Saturday, so then I reported it Monday.

Mr. Angland: I believe that is all.

Redirect Examination

Q. (By Mr. Hoffman): Just a minute, please. Mr. Angland inquired about your present employment, where are you employed at present?

A. I have an insurance agency in Shelby.

Q. In Shelby, Montana? A. Yes.

Q. When did you sever your connections with

(Testimony of Jane Halverson.)

Mr. Kelly's office? A. July 1st, 1954. [145]

Q. And have you had any business connections, that is, in Mr. Kelly's office since that time?

A. No.

Q. Had insurance for Tacke ever come up or been discussed in your office to your knowledge before September 20th, 1952? A. No.

Mr. Hoffman: That is all.

Mr. Angland: That is all.

BILL KELLY

was called as a witness by defendant, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hoffman): You may state your name, please. A. Bill Kelly.

Q. And Kelly Realty Insurance have been mentioned here throughout the trial, what connection do you have with that office?

A. That is my office.

Q. Your business name, isn't it? A. Yes.

Q. And you were the agent of the Canadian Indemnity Company at the time? [146]

A. That is correct.

Q. Were you not? A. Yes.

Q. I am referring to September 20th, 1952?

A. Yes.

Q. Do you remember what time you came to the office that day, if you did?

A. Right at 10:00 o'clock.

(Testimony of Bill Kelly.)

Q. And do you remember of any conversation referring to this particular insurance?

A. Yes, that was the first thing brought to my attention by Jane was in regard to this insurance coverage with the Tackes, and, of course, I felt pretty good about it, and was a little bit surprised and I remembered Jane's reason for bringing it up particularly because Mrs. Tacke seemed excited and I might add I have had enough phone calls with Mrs. Tacke and I know she has her problems with her children and she calls and carries on business about landscaping when Leo was working so my experience with her was she was just a little bit long-winded and excited and it didn't seem out of order for me because she has her problems.

Q. So Mrs. Halverson was suspicious of this application? A. Yes, Jane was.

Q. And conveyed that to you?

A. Yes. [147]

Q. And what did you do in reference to that, did you say anything to her about the policy, about issuing the policy?

A. Well I just judged it on things on the merits, I had known Leo and had a few dealings with him, ordinary dealings and I thought his character was beyond reproach.

Mr. Hoffman: If you will just listen to the questions and then answer.

Q. Did you say anything to Jane about issuing the policy?

(Testimony of Bill Kelly.)

A. I decided I should write it; we knew of nothing else at the time.

Q. Did you at that time have any notice or knowledge that the accident had actually happened before that?

A. No, the first time I knew of an accident was when I returned after a noon appointment. I arrived about twelve or a little after possibly and here was the loss claim sitting on my desk.

Q. Did you know who reported the accident?

A. A notation showed that Mr. Tacke had.

Q. Did it show about what time in the day that he reported the accident?

A. Not to my knowledge.

Q. I believe his testimony was it was reported between 11:30 and 12:00, would that be about according to your knowledge? A. Yes. [148]

Q. As near as you know? A. Yes.

Q. Do you know whether the policy had been written up at that time?

A. Yes, it was written.

Q. Did Mr. Tacke's report on the accident state when the accident had occurred? A. No.

Mr. Angland: Just a minute, the best evidence on that would be the memorandum and we have that, your Honor; the report of the accident would be the best evidence of that.

Q. I now show you the document marked by the Clerk of the Court as Defendant's Exhibit No. 17 and I will ask you if this is the loss report you found on the desk you speak of? A. It is, yes.

(Testimony of Bill Kelly.)

Q. And is that a part of the records in your office in connection with the case? A. It is.

Q. And calling your attention to the typewritten part of your report and also the part that is written below in pen and ink, was this part that is written in pen and ink a part of the original loss report that you found on your desk at the time?

A. I am sure that this written in here in long-hand was [149] done after it was originally typewritten.

Q. So that as to the report you found on your desk that morning it was just the typewritten part?

A. Yes.

Q. And this part written in pen and ink was put in later, is that correct? A. Yes.

Q. Have you any way of fixing the time that that was put in with pen and ink?

A. Well it says disposition of payment.

Mr. Baillie: Just a minute. Your Honor, this has not been placed into evidence or attempted to be placed into evidence and we haven't seen it.

Mr. Hoffman: I am asking him now if he knows when this part was made up.

Mr. Baillie: As to the contents of the document?

Mr. Hoffman: The question is if he knows what time.

A. I don't know what date this handwritten information was put in there; it is Mrs. Halverson's writing.

(Testimony of Bill Kelly.)

Q. Will you remove that from your file, please, Mr. Kelly?

Mr. Hoffman: We offer Defendant's Exhibit No. 17 in evidence. [150]

Q. (By Mr. Baillie): Mr. Kelly, do you know of your own knowledge who prepared this document? A. Yes.

Q. And who prepared it?

A. Jane Halverson.

Q. How do you know that she prepared it?

A. It is also on the office form and we fill that out in our own office for our own knowledge.

Q. But you testified you found this on your desk when you returned? A. Yes.

Q. Do you know who wrote the pen and ink notation? A. Yes.

Q. Who was that? A. Jane Halverson.

Q. How do you know that?

A. I know her handwriting.

Q. Do you know when it was written?

A. I don't know the time following the typing, no. Of course, that refers, the handwriting refers to the disposition of the cash and it was in suspense for a little while; I don't know what time that was put in there.

Q. You have no idea when she might have written that pen and ink notation? A. No. [151]

Mr. Angland: Your Honor, we object to the document; there is some writing here that we don't know how it was appended to this document and

(Testimony of Bill Kelly.)

it is an attempt apparently to bind the plaintiff by some pen and ink writing at some later time.

Mr. Hoffman: We will withdraw the offer at this time, if the court please, and find out when Mrs. Halverson wrote it.

Mr. Angland: I asked for a report Mr. Tacke made; I didn't ask for a report of Mr. Kelly. If Mr. Tacke made a report, then I want them to produce that.

Mr. Hoffman: That is in evidence, if the court please.

Q. (By Mr. Hoffman): Now, Mr. Kelly, you heard Mrs. Tacke testify in this case, did you?

A. Yes, sir.

Q. In reference to about 2 or 3 weeks before the accident—strike that question—did you also hear Leo Tacke's evidence in this case?

A. Yes, sir.

Q. Now referring first to Leo Tacke's testimony about 2 or 3 weeks before the accident, do you recall Mr. Tacke's putting in a lawn out on 28th Street and 6th Avenue South?

A. Yes, sir. [152]

Q. Did Mr. Tacke while he was on that job have a conversation with you at the site of the work? A. Yes, sir.

Q. And will you narrate to the court what that conversation was?

A. Well the conversation of course was over three years ago and I can't recall the details; it was generally and completely about landscaping; in

(Testimony of Bill Kelly.)

the conversation I have no recollection about ordering any insurance as Mr. Tacke has testified.

Q. Did Mr. Tacke at that time say to you in substance or effect that when he was ready to insure he would insure this Chevrolet car with you?

A. I have no recollection of that; that particularly at the time of the accident would have been a factor but that never never happened.

Q. That never happened? A. No.

Q. Now in reference to the question Mr. Tacke has testified that it was then and there agreed between you and him that the premium on the insurance policy would be paid out of the commission on a real estate deal involving real estate that was referred to your office through Mr. Tacke's activities as he testified, was there anything said between you and Mr. Tacke at that time about paying for any premium [153] of insurance in that way?

A. Nothing.

Q. He also testified that when he told you he was going to take the insurance on the Chevy that you expressed an appreciation of knowing so, did you do any such thing?

A. No, I didn't. I had no knowledge of any insurance until the day of the accident.

Q. Now he spoke about a second conversation with you about this insurance and again after this which I take it on his testimony would be one or two weeks before the accident he said he had a conversation with you on your own home lawn, do you remember a conversation about that time?

(Testimony of Bill Kelly.)

A. Yes, I do.

Q. And you may state to the court whether or not at that time he made any statement in substance and effect that his Chevy would be in driving shape in a few days and that he wished a policy of insurance to eventually issue on this out of your office?

A. I have no knowledge of the '48 Chevy ever being mentioned; that night when he stopped I was mowing the lawn and he did express to me he had been writing insurance with Yeoman especially hail insurance and that he would certainly like when the hail season came up to swing the business over to our office if we would help him with his landscaping, that I naturally being in business encouraged but we did not [154] ever receive any business from Mr. Tacke, nor did we ever license him and that is the only conversation about insurance I can remember prior to the accident and that had relationship only to hail insurance.

Q. Did you ever at any time have a request for insurance on this Chevy from Mr. Tacke, you personally?

A. I personally never have, no.

Q. Now you have indicated to the court that Mrs. Halverson expressed some suspicion about this application on the morning of September 20th, will you state to the court what you understood your duties were in reference to issuing a policy of insurance?

Mr. Angland: Just a minute. We object to that,

(Testimony of Bill Kelly.)

your Honor, as to his understanding what his duties were with reference to the issuance of insurance; we have here an insurance policy that was in fact issued by him, and the answer admits he was authorized to enter into the contract of insurance; we object to any explanation about the matter at all; the facts are undisputed.

The Court: He could show what the custom of his office was as to the matter of issuing policies of insurance under like circumstances; if there was anything there that would be material here.

Q. (By Mr. Hoffman): In the regular course of business in your office [155] how do policies of casualty insurance issue in your office?

A. Either by telephone or in person, which is originally written down with detail on our order blank and from that the policy is typed and mailed, and when necessary Halverson brought it to my attention; she expressed that there was a little excitement in Mrs. Tacke's voice and it brought that question in her mind and she asked me about it. We had no knowledge of any accident and the decision at that very minute was made, if she called up for insurance she's got protection. Now the subject did come up about the excitement and I said, well, I know Mrs. Tacke from many phone calls and I have never met her personally but I do know she is exciteable, I would overlook that and certainly with reference to the back-dating of the policy one day I expressed that I didn't ever think that Leo Tacke would request anything and said, give him certainly the benefit of the doubt.

(Testimony of Bill Kelly.)

Q. And it was your intention then to insure from the time the application was received?

Mr. Angland: Just a minute. Your Honor, now to that we do object. There is a policy of insurance in here; the policy of insurance speaks for itself. The effective date the time the policy became effective is in the policy itself; the company has ratified and confirmed that policy in that form consistently up to this time and we don't believe they should be permitted at this time to attempt to change it. [156]

The Court: Oral testimony would be admissible now to alter the terms of a written instrument.

Q. (By Mr. Hoffman): There was a gentleman named, was it Sterling? A. Yes, sir.

Q. Do you have a man in your office by that name? A. Yes.

Q. What was his duties there or business in your office?

A. He was our real estate salesman, one of our men.

Q. Did he write insurance?

A. No. He brought in a lot of insurance but his job was selling real estate; that is what he liked.

Q. Now there was some testimony by Mrs. Tacke that about September 17th you wanted her father to clean up a property for sale and in connection with that business did she or did she not say to you, Bill, be sure to see that we are insured?

A. Never.

Q. Does Mrs. Halverson have a habit of coming to work at your office, or did she at that time—

(Testimony of Bill Kelly.)

Mr. Angland: Just a minute. Your Honor, we object to testifying what Mrs. Halverson's habits are; they don't tend to prove or disprove any issue in the case.

Q. As to her arrival at the office that morning?

The Court: If he knows when she arrived at the office. [157]

Mr. Hoffman: Yes. Well that is what I am asking.

Q. Do you know what time Mrs. Halverson reported for work in your office?

A. Specifically that morning I can't answer because I was not there but he have a habit—

Mr. Angland: Just a minute. He has answered the question, your Honor. I think that is adequate. We object to any volunteer testimony about the matter.

The Court: Yes, I will sustain the objection.

Q. (By Mr. Hoffman): Do you have a regular opening time for your office?

A. Yes, 9:00 o'clock. If anyone gets there ten minutes to nine they usually have to wait because we have a lot of night work and that is an early start for us.

Mr. Hoffman: You may take the witness.

Cross Examination

Q. (By Mr. Baillie): Mr. Kelly, what was Mrs. Halverson's capacity, what was her job in the agency in September, 1952, what did she do, what was her title?

A. She was in charge of our insurance depart-

(Testimony of Bill Kelly.)

ment and our insurance girl and also secretary-bookkeeper.

Q. She was in charge of the insurance department? [158] A. Yes.

Q. She would have authority to issue and countersign policies of insurance? A. Yes.

Q. I believe you have testified that you did some work with Mr. Tacke, held several conversations with him concerning landscaping and lawns?

A. That is correct.

Q. Work that he did for you? A. Yes.

Q. Do you recall any incidents where there was any soliciting of property for sale or such duties as that for you?

A. There was the one lawn situation which of course in our business we don't pay too much attention to because we will spend as much time with a lawn as we do with a house and at that time they didn't have much consideration involved, I don't recall whether it was listing or buying for a lot but just to be pleasant about it I encouraged it but nothing ever happened; if we can help Leo get a little money for his family, we were going to try to help him.

Q. Mr. Kelly, about that time, September 20, 1952, or immediately previous to that had you had many telephone conversations with Mrs. Tacke?

A. Yes. [159]

Q. And mostly in connection with the landscaping of lawns and so forth?

A. That is exactly.

(Testimony of Bill Kelly.)

Q. And did you initiate all of those calls or were some of them initiated by her?

A. Well I will say 80% of them were initiated by her; we used to hear from her quite frequently.

Q. I believe you testified Mrs. Tacke seemed quite excited on most of those occasions of your telephone calls?

A. Well quite excited I wouldn't say that.

Q. Excited, nervous?

A. Nervous, something on her mind she would call up.

Q. She was a rather high strung person over the telephone, would that be your opinion?

A. I wouldn't say really high strung, just windy.

Mr. Baillie: That is all we have.

Mr. Hoffman: That is all.

Mr. Hoffman: Mr. Angland, do you have in your possession the letter written to Mr. Tacke October 27th, 1952 by Mr. Hirst of the Montana Claims Adjustment Bureau?

Mr. Angland: I think we have such a letter.

Mr. Hoffman: Would you produce it, please?

Mr. Angland: Yes, sir. Yes, here it is.

Mr. Hoffman: Could I please recall Mr. Hirst.

The Court: Yes. [160]

W. D. HIRST

was recalled by defendants and testified as follows:

Direct Examination

Q. (By Mr. Hoffman): You may state your name, please.

A. W. D. Hirst.

(Testimony of W. D. Hirst.)

Q. Are you the same Mr. Hirst that just testified?
A. I am.

Q. And you do business under the name of Montana Claims Adjustment Bureau, do you not?

A. I do.

Q. Now in reference to this Tacke case I am handing you Defendant's Exhibit No. 18 and I will ask you to state whether or not you can identify that instrument?
A. Yes.

Q. Is that your signature to the instrument?

A. That is my signature.

Q. And what did you do with that instrument after you signed it?

A. We mailed that in the usual course of business.

Mr. Hoffman: We offer Defendant's Exhibit No. 18 in evidence.

Mr. Angland: May I inquire of the witness first to see whether or not this would tend to prove any issue in the case? [161]

The Court: Very well.

Q. (By Mr. Angland): Mr. Hirst, at the time you wrote this letter Defendant's Exhibit 18, dated October 27, 1952, had you prior to that time advised the Canadian Indemnity Company that your investigation disclosed that the accident had occurred prior to the issuance of the policy September 20, 1952?
A. I believe so.

Q. Well just answer yes or no?
A. Yes.

Q. You had?
A. Yes.

Q. And after you advised them of that is that

(Testimony of W. D. Hirst.)

when they directed you to write the letter dated October 27, 1952?

A. The Canadian Indemnity Company didn't advise me; H. S. Dotson Company.

Q. Well H. S. Dotson is their General Agent; the action of the General Agent becomes the action of the company; is that the situation?

A. That is the situation.

Q. (By Mr. Hoffman): And this letter was written with the authority of Mr. Dotson?

A. Yes.

Mr. Angland: We have no objection. [162]

The Court: It may be received in evidence.

[See page 212.]

Mr. Hoffman: You may take the witness.

Mr. Angland: No questions.

HIRAM S. DOTSON

was called by defendant and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Hoffman): You may state your name, please. A. Hiram S. Dotson.

Q. Where do you reside?

A. Helena, Montana.

Q. Did you formerly reside in Great Falls?

A. Yes, I did.

Q. When did you begin living in Great Falls, Mr. Dotson? A. '30.

Q. And when did you go to Helena?

(Testimony of Hiram S. Dotson.)

A. '34.

Q. From Great Falls?

A. I went to Butte first for a short time and then to Helena.

Q. And during all that time what business were you engaged in?

A. In the insurance business. [163]

Q. Have you been engaged in the insurance business ever since, Mr. Dotson? A. Yes.

Q. And are you so engaged now? A. Yes.

Q. What relation did you have in '52 with the Canadian Indemnity Company?

A. Well the H. S. Dotson Company, of which I am President, was the General Agent for the State of Montana.

Q. And you may state whether or not this Tacke claim was handled through your office for the Canadian Indemnity Company?

A. We handled all claims for the company.

Q. And I think there has been introduced in this case a letter written by you cancelling the policy, showing you Plaintiff's Exhibit No. 9, you may state whether or not that is your signature?

A. No, that is A. W. Bacon's signature; he is Secretary of the company.

Q. That issued out of your office, did it?

A. Yes.

Q. Were you familiar with this case at the time that issued?

A. I was familiar with it to quite an extent, yes.

Q. Calling your attention to the date of the

(Testimony of Hiram S. Dotson.)

instrument, [164] which is a notice of cancellation of the policy under the terms of the policy, did you at the time this notice was issued have information in your office which led you to believe or did you believe at that time that this accident had actually happened before the policy was applied for?

Mr. Angland: Just a minute. To which we object your Honor and this is an attempt to impeach the last witness. Counsel has just produced a witness who has stated that October 27, 1952, the company directed him to notify Tacke of the cancellation by reason of the fact that he had advised the company; now this is an attempt to impeach Mr. Hirst and we object to any further attempt to impeach their own witness who also was a representative of the defendant company. I wish to call the court's attention to Exhibit 18, its contents is merely as follows:

"In regard to your accident of September 20th and the element of requesting insurance from the agency involved in this matter to inform you that you do not have any insurance policy in effect at the time this loss occurred."

It is not a notice of cancellation of the policy; it was a notice they claimed the policy did not cover that loss is all it was. Now if you will have the reporter read, I think I already asked Mr. Hirst one question concerning that and I said, did the company, and he corrected me and he said, H. S. Dotson Company told him to write that [165] after he had advised them that he had learned

(Testimony of Hiram S. Dotson.)

A. '34.

Q. From Great Falls?

A. I went to Butte first for a short time and then to Helena.

Q. And during all that time what business were you engaged in?

A. In the insurance business. [163]

Q. Have you been engaged in the insurance business ever since, Mr. Dotson? A. Yes.

Q. And are you so engaged now? A. Yes.

Q. What relation did you have in '52 with the Canadian Indemnity Company?

A. Well the H. S. Dotson Company, of which I am President, was the General Agent for the State of Montana.

Q. And you may state whether or not this Tacke claim was handled through your office for the Canadian Indemnity Company?

A. We handled all claims for the company.

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(Testimony of Hiram S. Dotson.)

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(Testimony of Hiram S. Dotson.)

through investigation that the loss had occurred prior to the ordering of the policy, and if you will have the reporter read the question I propounded to Mr. Hirst, your Honor, I think you will find that is the fact.

The Court: What question was that?

Mr. Hoffman: Maybe I should lay a deeper foundation here. I wanted to close this case by five o'clock and I am getting maybe in too much of a hurry.

The Court: You don't need to close it tonight or hurry it to close because if you have matters to present you have another day.

Mr. Hoffman: I will go back to my question that I withdrew.

Q. When is the first time that you knew or believed that this accident had actually happened before the policy was applied for?

Mr. Angland: Just a minute. Your Honor, again he is asking to impeach the last witness. I think if he is going to contradict, he is asking him when, he is trying to fix a time later than October 27, 1952. It's an attempt to impeach his own witness and another representative of the defendant company.

The Court: It does seem to have a bearing along that line. [166]

Mr. Angland: If the court please, our position is this letter of October 27th, 1952, is not notice of cancellation of the policy particularly under the

(Testimony of Hiram S. Dotson.)

terms of the policy; the policy provides that the company——

The Court: Let me see it.

Mr. Angland: The question I asked Mr. Harrison must be considered with the letter, your Honor.

The Court: Well the effect of it is substantially the same as a cancellation; he says there is no coverage at the time the accident occurred; that is the effect of it.

Mr. Angland: And he said that that was issued by him after he knew and had advised H. S. Dotson Company that the accident had occurred prior to the ordering of the insurance; he says that action was taken by him after that time.

Mr. Hoffman: The case is a little involved and we want the court to have all the facts to make up his decision upon.

The Court: What are you really trying to adduce from this witness in the way of testimony?

Mr. Hoffman: How he happened to issue the notice of cancellation.

Mr. Angland: Your Honor, the notice of cancellation like the insurance policy speaks for itself. I don't think it needs explanation. Has your Honor looked at it? [167]

The Court: Let's see it.

Mr. Angland: Here is the cancellation; I think it speaks for itself.

The Court: What was the date of that letter he just read?

Mr. Hoffman: October 27, 1952.

(Testimony of Hiram S. Dotson.)

The Court: Well this would follow as a natural result of the letter that preceded it and they finally come to the conclusion and cancel it some 2 or 3 months after they had said there was no coverage; that is what it amounts to; they are both in writing and they do speak for themselves. I don't know what more you can bring out in regard to them, they speak for themselves; the letter says there was no coverage at the time the accident occurred and 2 or 3 months later they cancel the policy.

Mr. Hoffman: Under the terms of the policy and later when we got to the case and completed our investigation we tendered the whole premium back on the ground we believed that fraud voided the entire contract from the inception and that under the statute to rescind had sent the rest of the consideration.

Mr. Angland: So they think, your Honor. Mr. Hoffman is proposing to the court they can take all these actions and retain the premium, and then two years later when liability attached to Mr. Tacke by lawsuit then they [168] can rescind; that isn't the law of rescission and I am sure your Honor knows it.

The Court: Well you can bring it all up later and I will have to wade through these arguments.

(Question read.)

Mr. Angland: Then I objected, your Honor.

The Court: Well, of course, the written document itself shows they had information in their office, followed by cancellation. I think these two in-

(Testimony of Hiram S. Dotson.)

struments speak for themselves. I don't think they require any amendment or explanation.

Mr. Hoffman: If I may just make this additional remark, please. This case was set up in Mr. Dotson's office by this report of the accident signed by Tacke that the loss occurred at 9:30 in the morning, and the initial setup of this case in his office was that the loss occurred before nine o'clock, and it is a gradual evolution and investigation and discovery of new evidence which finally by the time we wrote the letter cancelling, that it be cancelled for fraud from the beginning, those facts were a little bit slow in accumulation.

The Court: Well you haven't got any fraud in this case; it isn't set up in the pleadings, either way there is none here at all.

Mr. Angland: No pleading of rescission either, your Honor. [169]

Mr. Hoffman: The courts in cases speak of fraud in law where they attempt to consider an accident that already occurred; even without the knowledge of the insured they speak of it as a fraud in law.

The Court: Well you can bring that up later. This is no time to discuss it now.

Mr. Hoffman: I believe the court has ruled against your answering the question, Mr. Dotson.

Mr. Hoffman: You may cross examine the witness.

Mr. Angland: No cross examination.

Mr. Hoffman: I would like to inquire of Mrs. Halverson when she made this endorsement.

The Court: All right.

Mr. Hoffman: She says she couldn't remember when she endorsed it.

Mr. Hoffman: I think we will waive that. Since they object to its admission we will waive it.

The Court: Have you another witness?

Mr. Hoffman: I think not.

The Court: Any rebuttal?

Mr. Angland: If the defense has rested, your Honor, if we could have just a moment so I could talk to Mr. Baillie I think we might end this case in a hurry.

The Court: Very well.

Mr. Angland: No rebuttal of plaintiff, your Honor. [170]

The Court: Very well, how much time do you need after the transcript is written up on the first brief?

Mr. Angland: I think we probably better ask the court to allow us 30 days.

The Court: Very well, upon receipt of the transcript you may have 30 days, and the defendant 30 days, and the plaintiff says 20 days to reply.

Mr. Angland: Thank you, your Honor.

Court adjourned at 5:05 p.m. on July 28, 1955.

[Endorsed]: Filed March 14, 1956.

PLAINTIFF'S EXHIBIT No. 1

[Letterhead of Hoffman and Cure.]

Messrs.: Emmett C. Angland
William L. Baillie

^{June}
~~July~~ 11, 1954

521 Ford Building
Great Falls, Montana

Re: Pearl Kisse vs. Leo Tacke

Dear Sirs:

Returned herewith is the copy of the summons and complaint which were delivered to our office a few days ago.

Please take notice that the Canadian Indemnity Company declines to defend this action for the reason that the loss had already occurred when the policy issued and had, in fact, occurred before the policy was ordered out, and for the further reason that we cannot proceed under the reservation of rights which Mr. Tacke has already signed because he refuses to collaborate or cooperate with us, and has given us notice that you are his attorneys in the matter, and have always been his attorneys.

We enclose herewith our check, payable to the order of Leo Tacke, in the sum of \$9.83, the balance of the paid premium on the policy. Notice of cancellation of the policy was given by the company under erroneous information that the accident had actually occurred after the policy was ordered out September 20, 1952, and that because

thereof ten days notice of cancellation was necessary.

If you have any objection to the form of tender of the balance of the premium, please advise us and we will return the balance of the premium in legal tender.

The writer has already notified Mr. Tacke.

Very truly yours,

HOFFMAN & CURE,

/s/ By H. B. HOFFMAN.

HBH/map

encl.2

CC—summons & complaint

Check—\$9.83

PLAINTIFF'S EXHIBIT No. 2

[Check]

Affiliated With 1st Bank Stock Corporation

93-15/921 No. 824

Hoffman & Cure, Attorneys-at-Law

501-503 First National Bank Building

Great Falls, June 11, 1954

Pay to the Order of Leo Tacke.....\$9.83

Nine and 83/100.....Dollars

HOFFMAN & CURE

/s/ H. B. HOFFMAN

To The First National Bank

Established 1886

Great Falls, Montana

[Penwritten "Cancelled" across face of note.]

PLAINTIFF'S EXHIBIT No. 3

[Letterhead of Emmett C. Angland.]

Hoffman & Cure

June 12, 1954

Attorneys at Law

First National Bank Building

Great Falls, Montana

Re: Pearl Kissee vs. Leo Tacke

Gentlemen:

Reference is made to your letter of June 11, 1954.

You advise that the Canadian Indemnity Company declines to defend this action for Mr. Tacke in accordance with the terms of the policy of insurance issued to Mr. Tacke. You state that one of the reasons for declining to proceed is that Mr. Tacke refuses to collaborate or cooperate with you under the reservation of rights which he signed and further that he has given you notice that William L. Baillie, Esquire, and the writer are his attorneys in the matter.

While we have not always been his attorneys as stated in your letter, it has been necessary for us to do considerable work for Mr. Tacke. The Canadian Indemnity Company put Mr. Tacke's driver's license in jeopardy and it was necessary for us to represent Mr. Tacke in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade in a proceeding to correct the injustice attempted to be perpetrated by the Canadian Indemnity Company through the Montana Highway Patrol. The Canadian Indem-

nity Company was fully informed of this proceeding by service of proper documents on the General Agent of the Company by the Sheriff of Lewis and Clark County on June 12, 1953.

You may be assured that if the Canadian Indemnity Company retains you to represent Mr. Tacke as it should do in accordance with the terms of the insurance policy issued to Mr. Tacke, you will find that Mr. Tacke will be glad to cooperate with you and comply with the terms of the policy in every respect so far as he is concerned.

You have enclosed with your letter of June 11, 1954, a check payable to the order of Leo Tacke in the sum of \$9.83. You inquire as to whether or not we object to the form of tender of what you state is the balance of the premium. Mr. Tacke paid the full premium in September of 1952. Presumably this \$9.83 is the earned premium and now that Mr. Tacke has been sued the Canadian Indemnity Company no longer wishes to retain the earned premium. Mr. Tacke has requested us to return your check. He purchased something for the premium, the thing he purchased is what he wants and he does not propose that either this or any other insurance company can escape its contractual liability when it might be called upon for a loss by simply refunding the premium paid for the coverage.

Your check No. 824 in the sum of \$9.83 is returned herewith.

You further advise in your letter "notice of cancellation of the policy was given by the company

under erroneous information that the accident had actually occurred after the policy was ordered out September 20, 1952 and that because thereof ten days notice of cancellation was necessary." This is another attempt by the Canadian Indemnity Company to escape its contractual and legal responsibility in this matter after Mr. Tacke has been sued.

Very truly yours,

/s/ EMMETT C. ANGLAND
Emmett C. Angland.

ECA:la

Enc:

PLAINTIFF'S EXHIBIT No. 7

[Envelope]

3c Cancelled Stamp

Postmarked Great Falls, Mont. 5 P.M. Sep. 20, 1952

The Rocky Mountain Fire Insurance Co.

Bill Kelly Realty

(Formerly Malmberg Agency Since 1900)

Get Results—Call Kelly

No. 7 Sixth Street North

Great Falls, Montana

Addressed to: LEO TACKE

124-20th St. S.W.

Great Falls, Mont.

PLAINTIFF'S EXHIBIT No. 8

[Receipt]

Get Results—Call Kelly Save Your Receipts
Great Falls, Montana, Sept. 22, 1952 No. 1849
Received of Leo Tacke

Thirty Nine & no/100 Dollars.....\$39.00
—insurance—

Bill Kelly Realty
/s/ By I. Halverson

Thank you.

PLAINTIFF'S EXHIBIT No. 11

[Letterhead of O. B. Kotz.]

Mr. Leo Tacke December 18, 1952
124 - 20th St. S. W.
Great Falls, Montana

Re: Ed Kissee and wife Auto Accident Damage
Claim.

Dear Mr. Tacke:

Mr. Ed Kissee has placed with me for attention a settlement of his claim against you for damages sustained to his car and injuries sustained by his wife when your car collided with his during the latter part of September. He informs me that you were charged with reckless driving and forfeited your bond of \$15.00; that the accident was due to your fault, or negligence, and that you offered to make settlement but the same was not satisfactory to

him. The estimated cost of repairs to his car range from \$735.00 to \$800.00, and he demands payment for the cost of repairs as well as cost of hospital and doctor expenses incurred on account of the injuries sustained by his wife.

He will accept the actual costs of the repair bill, as well as that of the hospital and doctor, if the same is taken care of within the next few days. That is, if you will at least call and agree to make such settlement as is satisfactory to him. This offer of settlement is made without prejudice to his rights and the rights of his wife in the event that you do not accept this settlement and take care of same in a satisfactory manner.

I trust I may hear from you within the next week so that it will not be necessary to institute suit against you.

Yours truly,

/s/ O. B. KOTZ

O. B. Kotz

OBK-d

DEFENDANT'S EXHIBIT No. 12

REPORT OF AUTOMOBILE ACCIDENT

To the Canadian Indemnity Company—Canadian Fire Insurance Company.

Policy issued by Bill Kelly, Agent at Gt. Falls, Mont. Policy No. 22 CA 3908.

1. Name of Assured: Leo Tacke. Date of Policy: 9-20, 1952.

Address— No. 124 20th St. S.W., City of Gt. Falls, State of Mont.

2. Person driving assured's car at time of accident: Leo Tacke. Age: 38 years.

Address— Street, same; City, same; State, same.

Occupation of person driving assured's car: Body repairman. Was he in employment of assured?

3. Purpose for which car was being used at time of accident: Business. What is his relation to assured?

4. Make of automobile: Chevrolet. Year model: 1948. Type of body: 4-dr. sedan. * * * * *

5. Date of accident: September 20, 1952. Hour: 9:30 o'clock a.m. Condition of weather: Good.

6. Place where accident occurred: Road intersection of Sun River bridge (wagon bridge) & county road, Great Falls, Mont.

7. Speed of assured's car: 25 mph. Speed of other car: Unk. m.p.h. Kind of road or pavement: Blacktop.

8. Name of driver of other car: Ed Zeen. Address: 2301 10th Ave. So., City.

9. Make of his automobile: 1935 Dodge. Type of body: Truck. * * * * *

10. Damage to Assured's Car:

Estimated damage \$250.00. Nature and extent of damage: Hood, grille, left fender, radiator, right fender, water pump, fan, splash pans.

Name of person who caused damage: Leo Tacke. Address: City.

Is he insured? Yes. Name of insurance company.....

Where is assured's automobile now? At home.

11. Damage to Property of Others:

Estimated damage \$200.00. Kind of property and nature of damage: Cab, right side of truck.

If automobile, make of car: 1935 Dodge. Type of body: Truck. Year model.....

Name of Owner: Ed Zeen. Address: City.

Is he insured? Yes. Name of insurance company: State Farm Mutual.

Where is damaged property now? At home.

12. Personal Injuries:

Names of injured persons and addresses:

Mrs. Ed Zeen (in Deaconess Hospital for observation)—Dr. Richardson. Age: I believe about 60.

Leo Tacke, knocked unconscious. Taken to Deac. Hospl.—Dr. Bob McGregor. Age: About 38.

Dickie Tacke, age 12, knocked unconscious. Taken to Deacon. Hospl.—Dr. Bob McGregor. Also, left arm injured.

If medical aid was rendered, give name of doctor: Tacke's—Dr. Bob McGregor. Zeen's—Believe Dr. Richardson, G. F. Clinic.

Where were injured taken? Deaconess Hospital.
* * * * *

14. Explain fully how accident occurred: I was traveling South on 15th St. West which goes down and crosses the old Sun River bridge and intersects a county road. I was traveling at about 25 miles per hour and my son was in the front seat with me. The last I remember we were some 150' from the intersection. The next thing I can remember I was being put in the ambulance and taken to the hospital. I do not remember seeing another car before that or anything else.

15. Names and addresses of witnesses: Ray Bull, age approx. 15 years, 1418 3rd Ave. N.W., phone number 5378. Vane Fisher, boy, age approx. 15 years, Rte. 1 West.

State whether witness was in Assured's car; in other car, or where: In another car. (These two boys were together in a car.)

Date of this Report: 9-24, 1952, at Great Falls, Montana.

/s/ LEO T. TACKE,
Assured.

AUTOMOBILE INSURANCE APPLICATION

BILL KELLY REALTY

depts Ex #13
Case # 1648
Tacke vs
The Canadian Insurance Company

Name of Insured Leo Tacke

Address 124 - 20th St NW

Occupation Mechanic Drill

Policy Period: From 9-20-52 to 9-20-53

COVERAGES	LIMITS OF LIABILITY	PREMIUMS
A. Bodily Injury Liability	\$ <u>10,000</u> each person \$ <u>20,000</u> each accident	\$ <u>24.00</u>
B. Property Damage Liability	\$ <u>5,000</u> each accident	\$ <u>11.00</u>
C. Medical Payments	\$ <u>500</u> each person	\$ <u>4.00</u>
D. Comprehensive	\$ _____	\$ _____
E. Collision or Upset	Actual Cash Value Less \$ _____ Deductible.	\$ _____
F. Fire, Lightning and Transportation		\$ _____
G. Theft		\$ _____
TOTAL PREMIUM		\$ <u>39.00</u>

Description of automobile:

Year	Trade Name	Model	Body Type	Serial No.	Motor No.
<u>48</u>	<u>Chev.</u>		<u>4dr.</u>		
Symbol	Cost	Purchased	Encumbrance		

Purpose for which automobile is to be used Bus & ll Ed

Mortgagee Called our office 9:30 A.M.

Agent Office

Insured's Signature

The liability is clearly that of Mr. Tacke and there are rather severe personal injuries involved. We have been dealing with Attorney Kotz for some time and have forestalled the filing of suit. We do not believe we will be able to forestall the filing of suit in the near future.

The Montana Highway Patrol on April 28, 1953, issued a Notice of Security Requirement or Order of Suspension by reason of the accident hereinbefore referred to. The Montana Highway Patrol acted according to advice your Company gave that office to the effect that Mr. Tacke was not covered by insurance at the time of the accident that occurred September 20, 1952.

It became necessary for Mr. Tacke to employ the undersigned to appeal the decision of the Supervisor of the Montana Highway Patrol. Copy of the Notice of Appeal and other pertinent documents were served upon your General Agent, H. S. Dotson Company, at Helena, Montana.

The District Court set aside the Suspension Order of the Montana Highway Patrol. A copy of the order of the District Judge is enclosed herewith.

As the situation now stands suit will probably be filed against Mr. Tacke in the near future. We are at this time calling upon you to extend coverage to Mr. Tacke in accordance with the terms of the policy which you issued to him. We are aware of the fact that there is some claim on the part of

your Company that this policy was secured by misrepresentation. While this is not the fact, even assuming that it were true, it is our view that your Company by issuance of the policy and acceptance of the premium has waived its right to deny the effectiveness of the policy.

You realize that Mr. Tacke is not overlooking the fact that his policy also included medical payments to cover the medical expenses incurred by Mr. Tacke and his child.

We have devoted considerable time to checking into this matter for Mr. Tacke; for conferences with Attorney Kotz, for investigation of this accident, and for our legal research to determine the effectiveness of the policy as well as for the hearing had upon the validity of the policy as issued. A reasonable charge for our professional services to this date would be \$500.00. We expect your Company to pay these charges and also to accept coverage under Mr. Tacke's policy.

There are cases to the effect that in a similar situation the attorneys' fees as well as the amount expended to settle a claim when coverage has been denied are proper against the insurance company. You have issued a policy and by the very terms and provisions of the policy and in accordance therewith you effected the cancellation of that policy several months later. We will defer taking any further action in this matter until we hear from you. Due to the seriousness of the claims being

made we must ask that you notify us of your intentions on or before November 15, 1953.

Very truly yours,

WILLIAM L. BAILLIE,
EMMETT C. ANGLAND,
/s/ By EMMETT C. ANGLAND.

ECA:la

Enc.

cc: John J. Holmes,

Insurance Commissioner.

PLAINTIFF'S EXHIBIT No. 15

[Letterhead of The Canadian Fire Insurance Company—The Canadian Indemnity Company.]

Emmett C. Angland

November 2, 1953

521 Ford Building

Great Falls, Montana

Re: Claim No. 102,287. Assured: Leo Tacke. Date of Accident: 9/20/52.

Dear Mr. Angland:

We acknowledge receipt of your letter of October 30th.

This matter has been referred to our general agent for the State of Montana, H. S. Dotson and Company, Granite Building, Helena, Montana.

The attorney representing this Company in this case is Mr. H. B. Hoffman of the firm of Hoffman and Cure, First National Bank Building, Great

Falls, Montana. We suggest you contact Mr. Hoffman regarding this matter.

Yours very truly,

/s/ WINTER DEAN

Winter Dean,

Claims Superintendent.

WD/bs

cc: H. S. Dotson and Company

DEFENDANT'S EXHIBIT No. 16

(Copy)

Police Department—City of Great Falls

Police call [x]

Date: 9-20, 1952.

Call from: A lady. Address.....

At 8:24 o'clock a.m. Details: A bad accident north of Feiden's Greenhouse.

Swingley—Chamberlin—ambulance.

Officers assigned: Gray, car #5. Fisher, desk officer.

Report of Officer in Charge of Investigation

Took a Mrs. Pearl Kissee of 909 23rd Street South to the Deaconess Hospital where Dr. Richardson attended her. Also took a Leo Tacke of 124 20th Street Southwest to the Deaconess Hospital and he was attended by Dr. Robert McGregor.

A Dick Tacke, son of Leo Tacke, was taken to the Deaconess Hospital by a Ray Bull of 1418 3rd Avenue Southwest and Vern Fischer of Route 1 West, and he was attended by Dr. Robert McGregor. Accident was investigated by Highway Patrol—Fousek.

/s/ SWINGLEY.

DEFENDANT'S EXHIBIT No. 18

[Letterhead of Montana Claims Adjustment
Bureau.]

Mr. Leo Tacke
124 20th Street Southwest
Great Falls, Montana

October 27, 1952

Re: Canadian Indemnity Company & Canadian
Fire Insurance Company Policy No. 22 CA 3908—
D/A September 20, 1952. Our file 52 868.

Dear Mr. Tacke:

In regard to your accident of September 20th
and the element of requesting insurance from the
agency involved, please be advised that we have
been instructed by the company involved in this
matter to inform you that you do not have any
insurance policy in effect at the time this loss oc-
curred.

Yours very truly,

MONTANA CLAIMS
ADJUSTMENT BUREAU,
/s/ W. D. HIRST
W. D. Hirst

WDH:eb

[Endorsed]: No. 15704. United States Court of Appeals for the Ninth Circuit. Canadian Indemnity Company, Appellant, vs. Leo Tacke, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana, Great Falls Division.

Filed: August 26, 1957.

Docketed: September 9, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15704

THE CANADIAN INDEMNITY COMPANY,
Appellant,

vs.

LEO TACKE, Appellee.

CONCISE STATEMENT OF POINTS RELIED
UPON BY APPELLANT (ANEW)

Appellee sued appellant for an adjudication of the validity of an automobile liability policy and that defendant is liable and obligated in accordance with the terms of the policy,—and for equitable relief. Specifically, that because the policy, by its printed terms, fixes the beginning of insurance at 12:01 A.M. 20 Sept. 1952, an accident occurring prior to 8:24 A.M. that day is covered.

Appellant does not deny, or question, that the policy antedates the accident by approximately eight hours and twenty minutes, but denies coverage of this accident because:

1. Application for this policy was made after the accident occurred between 9:00 and 9:30 o'clock A.M., 20 Sept., 1952, by the appellee's wife, at which time appellee, who was driving the automobile involved when the accident occurred, of necessity knew the accident had occurred. This application was made to Kelly's Insurance Agency, and reduced to writing 9:30 A.M. that day by the employee of that office, Jane Halverson, who accepted the application after she inquired whether an accident had occurred, to which appellee's wife replied, "No." (Tr. 134, L. 9.)

2. Appellant did not know,—appellee did know,—the accident occurred before application for the policy was made and accepted.

3. The testimony of Jane Halverson that just before noon of the day of the accident appellee himself appeared in Kelly's office and reported the accident happened about 9:30 A.M. (Tr. 141, L. 14.)

4. Appellee's signed written report of the accident to appellant states the time of the accident 20 Sept. 1952, hour 9:30 o'clock A.M. (Exhibit 12.)

Our appeal is based upon the "settled rule of Insurance Law that where a loss, occurring before the risk attaches, is known only to the applicant and he obtains a policy without disclosing the fact

of the loss, the policy is void even though the contract be given a date prior to the loss." (Barry, et ux, vs. Aetna Ins. Co., Pa. Sup. Ct., 81 Atl. 2d 551.) At least, the prior risk is not covered by the policy.

That is the defense appellant pleaded. It stands proven and admitted.

Respectfully submitted,

/s/ H. B. HOFFMAN,

/s/ ORIN R. CURE,

Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 9, 1957. Paul P. O'Brien, Clerk.

